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## **TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1942**

**No. 87**

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THE PUBLIC UTILITIES COMMISSION OF OHIO,  
GEORGE McCONNAUGHEY, CHAIRMAN OF SAID  
COMMISSION, ET AL., APPELLANTS,

vs.

UNITED FUEL GAS COMPANY, ET AL.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF OHIO

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**FILED MAY 5, 1943**





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[fol. 1]

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF OHIO, EAST-  
ERN DIVISION**

**In Equity**

**UNITED FUEL GAS COMPANY, a Corporation organized and  
existing under the laws of the State of West Virginia,  
Plaintiff,**

**vs.**

**THE PUBLIC UTILITIES COMMISSION OF OHIO, created and  
existing under the laws of the State of Ohio; Edward J.  
Hopple, Chairman of said Commission; Charles F. Scha-  
ber and Roy D. Williams, members of said Commission;  
John W. Bricker, Attorney General of the State of Ohio;  
Donald C. Power, Special Counsel for said The Public  
Utilities Commission of Ohio; The City of Portsmouth,  
a municipal corporation; and Portsmouth Gas Company,  
a corporation organized and existing under the laws of  
the State of Ohio, Defendants**

**BILL OF COMPLAINT—Filed July 3, 1935**

**To the Honorable Judges of the District Court of the United  
States for the Southern District of Ohio:**

United Fuel Gas Company, a corporation, brings this  
its bill of complaint against The Public Utilities Commission  
of Ohio, Edward J. Hopple, Chairman of said Commis-  
sion, Charles F. Schaber and Roy D. Williams, members  
of said Commission, John W. Bricker, Attorney General  
of the State of Ohio, Donald C. Power, Special Counsel  
for said The Public Utilities Commission of Ohio, The City  
of Portsmouth, a municipal corporation, and Portsmouth  
Gas Company, a corporation, defendants, and respectfully  
shows:

**I**

United Fuel Gas Company is a corporation duly organ-  
ized and existing under and by virtue of the laws of the  
State of West Virginia, and is a citizen and resident of  
said State, and is engaged in the production, transporta-  
tion, distribution and sale of naturel gas for light and

fuel to certain of the inhabitants of southern West Virginia, [fol. 2] and is also engaged in selling natural gas so produced by it and purchased by it from others, to other companies or distributing agencies, by which it is sold to the inhabitants of other States of the Union for the purposes of light and heat; and that the principal office and place of business of said United Fuel Gas Company is at the City of Charleston, in the Southern District of West Virginia.

The defendant The Public Utilities Commission of Ohio, is a body created and existing under and by virtue of the laws of the State of Ohio and is exercising the powers conferred upon it by the laws of said State of Ohio, as the same exist at this time; that said Commission has its principal office in the City of Columbus, in said State, and in said Southern District of Ohio, and is constituted as hereinafter set forth, and is a citizen and resident of said State of Ohio and of the Southern District thereof.

The defendant Edward J. Hopple is the Chairman of said The Public Utilities Commission of Ohio and is a citizen of the State of Ohio and a resident of the City of Cleveland, in the Northern District of said State of Ohio.

The defendant Charles F. Schaber is a citizen of the State of Ohio and a resident of the City of Bucyrus, in the Northern District of said State.

The defendant Roy D. Williams is a citizen of the state of Ohio and a resident of the City of Athens, in the Southern District of said State.

The said last three named defendants are the duly appointed, qualified and acting members of said defendant The Public Utilities Commission of Ohio, the said Edward J. Hopple, under the provisions of law creating said Commission, having been designated to act as Chairman thereof and is now exercising the powers and duties thereof.

The defendant John W. Bricker is a citizen of the State of Ohio and a resident of the City of Columbus, in the Southern District of said State, and is the duly elected, qualified and acting Attorney General of the State of Ohio and is charged with the duty of enforcing the laws of said State.

[fol. 3] The defendant Donald C. Power is a citizen of the State of Ohio and a resident of the City of Columbus, in the Southern District of said State, and is the duly appointed, qualified and acting Special Counsel for said The Public Utilities Commission of Ohio, under and by virtue

of the provisions of law, and is charged by law with the duty of enforcing the orders of said Commission.

The defendant The City of Portsmouth is a municipal corporation, organized and existing under the laws of the State of Ohio, situate in the Southern District of Ohio, and is a citizen and resident of said Southern District.

The defendant Portsmouth Gas Company is a corporation organized and existing under the laws of the State of Ohio, having its principal office and place of business at the City of Portsmouth, Ohio, in the Southern District of said State, and is a citizen and resident of said Southern District of Ohio.

II

This suit is of a civil nature, in equity, and is brought for the purpose of obtaining a declaratory judgment that the two orders of The Public Utilities Commission of Ohio, one entered on the 18th day of April, 1935, and the other on the 29th day of May, 1935, which orders require the plaintiff to submit to said Commission such evidence as will show that the rate which it charges for natural gas to the defendant Portsmouth Gas Company is not in excess of a fair and reasonable rate, are unconstitutional and void, as well as for the purpose of enjoining the enforcement of said orders; that the natural gas sold by the plaintiff herein to the said Portsmouth Gas Company is produced or purchased from other producers by the plaintiff in the States of West Virginia and Kentucky, and transported in a continuous flow, through pipe lines, from the said States of West Virginia and Kentucky and delivered by it to the said Portsmouth Gas Company in the State of Ohio, without commingling the same with any gas produced or purchased in Ohio and without reducing the pressure at which the same is so transported, prior to such delivery, and said sale and delivery is, therefore, interstate commerce. That the attempt of the defendant The Public Utilities Commission of Ohio to prescribe the price at which the plaintiff shall sell its gas to the defendant Portsmouth Gas Company is an attempt upon the part of said Commission to regulate the plaintiff's business in interstate commerce, in violation of that part of Section 8 of Article 1 of the Constitution of the United States delegating to the Congress of the United States the exclusive power to regulate commerce with foreign nations and among the several States and with the Indian Tribes.



4  
The amount in controversy in this suit exceeds the sum or value of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

### III

That on the 22nd day of October, 1931, the plaintiff entered into a contract with the defendant Portsmouth Gas Company, by which it agreed to sell to said Portsmouth Gas Company, and the said Portsmouth Gas Company agreed to purchase from this plaintiff, the supply of natural gas required by said Portsmouth Gas Company to meet its obligations to its customers in the City of Portsmouth, Ohio, at the price of thirty-seven (37) cents per thousand cubic feet, except for the gas lost in distribution by the said Portsmouth Gas Company only the sum of twenty-five (25) cents per thousand cubic feet should be charged, which said contract is in full force and effect. An office copy of said contract is filed herewith as part of this bill, marked Exhibit "A".

### IV

That on the 24th day of February, 1932, the Council of the City of Portsmouth, Ohio, passed an ordinance fixing and prescribing, as a maximum, the following rates for furnishing natural gas service to the citizens, public grounds and buildings of the City of Portsmouth, Ohio, for the duration of the franchise of said Portsmouth Gas Company, to-wit: Forty-five (45) cents per thousand cubic feet, with a discount of five (5) cents per thousand cubic feet if monthly bills are paid within ten days after rendition of the monthly statement by the Portsmouth Gas Company, and a monthly minimum charge of fifty (50) cents; that said rate prescribed by said ordinance was much less than the rate then in effect in said City of Portsmouth; that the [fol. 5] said Portsmouth Gas Company, acting under the laws of the State of Ohio, appealed from said ordinance to the defendant The Public Utilities Commission of Ohio, basing said appeal upon the declaration that the said rate prescribed by said ordinance did not provide it fair compensation for the service rendered by it to the citizens of the City of Portsmouth in the distribution of natural gas to them for the purposes of fuel and light.

## V

That on the 16th day of September, 1933, the City of Portsmouth, Ohio, filed its petition in said proceeding pending before The Public Utilities Commission of Ohio upon appeal by said Portsmouth Gas Company from the ordinance fixing gas rates for said City of Portsmouth, as aforesaid, in which said petition the said City of Portsmouth represented, among other things, that the said Portsmouth Gas Company purchased all of its supply of natural gas from this plaintiff, United Fuel Gas Company, under a contract between said two companies, a copy of which was exhibited to said Commission with said petition and which is the same contract filed herewith as Exhibit "A". That the price charged by this plaintiff to said Portsmouth Gas Company was in excess of a fair and reasonable price for said natural gas, and that, because of this fact, the rate charged by said Portsmouth Gas Company was in excess of what would be a fair and reasonable rate, asserting that the defendant The Public Utilities Commission of Ohio had the power, under the statutes of Ohio, to regulate the price which this plaintiff should charge for the natural gas delivered by it to said Portsmouth Gas Company, and praying that this plaintiff be made a party to said proceeding and that the Commission ascertain and fix a rate to be charged by this plaintiff for the natural gas delivered by it to said Portsmouth Gas Company less than that prescribed in said contract. An office copy of said petition is filed herewith as part of this bill, marked Exhibit "B".

[fol. 6] That this plaintiff filed its answer to said motion, in which it denied the right and power of said The Public Utilities Commission of Ohio to fix the price at which it should sell natural gas to said Portsmouth Gas Company, and prayed that it be dismissed from said proceeding, inasmuch as no relief could be granted therein against it. An office copy of said answer is herewith filed as part of this bill, marked Exhibit "C".

That a hearing was had upon the said petition of said City of Portsmouth and said answer and motion of this plaintiff, and on the 18th day of June, 1934, said Commission entered an order declining to dismiss this plaintiff from said proceeding, but retaining it as a party thereto for such lawful orders as the Commission might subse-

quently make against it. A copy of said order is filed herewith as part of this bill, marked Exhibit "D".

That said The Public Utilities Commission of Ohio proceeded to ascertain what would be a fair rate for distributing the natural gas purchased by said Portsmouth Gas Company from this plaintiff to the consumers thereof in said City of Portsmouth, and on the 18th day of April, 1935, said Commission entered an order, in which it found that the rates prescribed for natural gas in the ordinance from which said appeal was taken were manifestly unjust, unreasonable and insufficient, but further found that before it could determine what would be a just and reasonable rate, it would be necessary for it to ascertain what would be a fair price to be charged by this plaintiff to said Portsmouth Gas Company for the natural gas furnished by it to said Portsmouth Gas Company, and required this plaintiff to proceed forthwith and with all diligence to prepare and, within ninety days from the date of said order, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to the Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio, in conformity with the provisions of the General Session Order of the Commission. A copy of said order is herewith filed as part of this bill, marked Exhibit "E".

[fol. 7] That this plaintiff filed before said Commission a petition for rehearing of said order and praying that a rehearing be granted and that said Commission make specific findings of fact upon the evidence introduced before it and specific declarations as to the power claimed by it to fix the price of the natural gas furnished by this plaintiff to the said Portsmouth Gas Company. A copy of said petition is herewith filed as part of this bill, marked Exhibit "F".

That said The Public Utilities Commission of Ohio, on the 29th day of May, 1935, denied the petition for a rehearing asked for by this plaintiff, but supplemented its order of April 18, 1935, by a specific finding, upon the evidence introduced before it, that the natural gas supplied by this plaintiff to said Portsmouth Gas Company was produced in the States of West Virginia and Kentucky and conveyed, together with other gas from the same sources, through a pipe line, in a continuous flow, from



the points of production in West Virginia and Kentucky into the State of Ohio, where the same was delivered to the Portsmouth Gas Company. Said Commission also found that this plaintiff and the said Portsmouth Gas Company has no connection with each other in any way, but were entirely separate and distinct companies. It also found, as a matter of law, that the furnishing of natural gas by this Plaintiff under its contract with the Portsmouth Gas Company was subject to regulation by said Commission, and that the rate to be charged therefor was subject to the jurisdiction of said Commission, and that it had the right to regulate the rate and price to be charged for such service. A copy of said order is herewith filed as part of this bill, marked Exhibit "G".

## VI

That as will be seen by reference to the order entered by said Commission on the 29th day of May, 1935, said Commission specifically found that the natural gas furnished by this plaintiff to said Portsmouth Gas Company was produced in the States of Kentucky and West Virginia [fol. 8] and transported from the points of production, in a continuous flow, through pipe lines, to a point in the State of Ohio, where that part of it which was sold to said Portsmouth Gas Company was delivered to it. That other gas from the same pipe line was delivered to a distribution system owned by this plaintiff supplying certain other Ohio towns, and there distributed by it to its customers, but without disturbing or interrupting the continuous flow of gas in said pipe line, either by reduction of the pressure therein or in any other manner, and that there was no connection between this plaintiff and said Portsmouth Gas Company, either directly or by affiliation, that would prevent either of said companies from exercising full discretion in making contracts; and that the said Commission, by its said orders of April 18, 1935, and May 29, 1935, required this plaintiff to show what the cost is to it of supplying said gas to said Portsmouth Gas Company, with the declaration that it (The Public Utilities Commission of Ohio) will fix the rate which this plaintiff shall charge said Portsmouth Gas Company for said gas, claiming that it has the right to regulate said price under the laws of the State of Ohio.

Plaintiff avers, as fully appears from the facts above stated, that the transaction between it and the said Portsmouth Gas Company is entirely in interstate commerce; that the power and jurisdiction assumed by said The Public Utilities Commission of Ohio to regulate the price at which this plaintiff shall sell its gas to said Portsmouth Gas Company in interstate commerce is a regulation of interstate commerce and is in violation of that part of Section 8 of Article 1 of the Constitution of the United States conferring upon the Congress of the United States the power to regulate commerce with foreign nations and among the several States and with the Indian Tribes.

Plaintiff says that the orders of said The Public Utilities Commission of Ohio, above referred to, and the statute law of the State of Ohio upon which the same are based, [fol. 9] which attempt to abrogate the contract entered into by it with the said Portsmouth Gas Company, are each and all null and void and in violation of that part of Section 10 of Article 1 of the Constitution of the United States which prohibits any state from passing any law impairing the obligation of contracts; that the effect of said statute of the State of Ohio, as construed by the Public Utilities Commission of Ohio in said orders, is not only to impair, but to entirely abrogate the contract existing between this plaintiff and the said Portsmouth Gas Company; and that the statute upon which said The Public Utilities Commission of Ohio relies as the basis for said orders was passed by the General Assembly of the State of Ohio on the 10th day of April, 1933, long after the making of the contract between this plaintiff and the defendant Portsmouth Gas Company involved in this case.

Plaintiff says that its interest in the said contract between it and the said Portsmouth Gas Company is a property right and constitutes property of the said plaintiff; that the action of the said defendant The Public Utilities Commission of Ohio in abrogating said contract destroys said property right and takes plaintiff's valuable property from it without due process of law and denies to it the equal protection of the laws, and is in violation of Section 1 of the Fourteenth Article of Amendment of the Constitution of the United States.

That to comply with said orders of said Commission would entail upon this plaintiff the expenditure of a very large sum of money in making inventories and appraisals

of its property; that its property consists of a large producing gas plant, containing many miles of pipe line, many compressor stations, more than two thousand producing gas wells, and other equipment and appurtenances necessary and proper for the production and marketing of natural gas. That to make an appraisal of said properties as required by said Commission would entail an expense upon this plaintiff of more than One Hundred Thousand Dollars (\$100,000.00).

[fol. 10] That said The Public Utilities Commission of Ohio is without any jurisdiction to make such orders or requirements of this plaintiff; that the statute under which it is acting, giving it such power as construed by it, violates the commerce clause of the Constitution of the United States, above referred to, and that the expenditure of said large sum of money by this plaintiff in complying with said orders would impose a burden upon it without any way of recouping itself for such expenditure; that by the laws of the State of Ohio, every public utility is required to observe and comply with every order, direction and requirement of said Commission made under the authority of the laws of the State of Ohio, and that any public utility which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of said Commission shall forfeit and pay to the State not to exceed One Thousand Dollars for each such failure, omission or neglect, and each day's continuance thereof shall be deemed and held a separate offense; and that any officer, agent or employee of any public utility who fails, omits or neglects to obey, observe or comply with any lawful order or direction of said Commission shall be fined not less than One Hundred Dollars nor more than One Thousand Dollars, or imprisoned not more than two years, or both, and each day's continuance of such failure, omission or neglect shall constitute a separate offense.

That the defendant John W. Bricker, as Attorney General of the State of Ohio, and the defendant Donald C. Power, as Special Counsel for The Public Utilities Commission of the State of Ohio, are charged with seeing that the laws and orders of said Commission are carried out, and that unless this plaintiff shall proceed forthwith to furnish an inventory and appraisal of its property as required by the order of said Commission, at the enormous expense hereinbefore stated, they (the said John W.

Bricker, Attorney General, and the said Donald C. Power, Special Counsel for said Commission) will proceed to enforce against this plaintiff the penalties provided for, as above indicated, and against its officers and employees the penal provisions of said statute.

That this plaintiff, if it carries out the provisions of said orders, will be irremediably injured and damaged to [fol. 11] the extent that it will require the expenditure of the large sum of at least One Hundred Thousand Dollars (\$100,000.00) in carrying out the same, or if it refuses to carry out said orders, it will subject itself to the attempt of said public officers of the State of Ohio to enforce against it and against its officers, agents and employees the penalties above referred to, so that, in any event, unless it is granted relief herein, it will suffer irremediable injury and damage by reason of the promulgation of the said orders of said The Public Utilities Commission of Ohio.

That in addition to the foregoing penal provisions, said The Public Utilities Commission of Ohio has promulgated certain rules and regulations, among others, one providing that if, in the judgment of the Commission, a party fails to use due diligence in the preparation of or in the conduct of a hearing, the Commission may, after due investigation, dismiss or sustain the appeal, approve or disapprove the proposed rate, or take such other action as in its judgment may be appropriate. This plaintiff says that unless it is granted relief against the said orders of said The Public Utilities Commission of Ohio, said Commission may, under the said rule, proceed in a summary way to fix the rate which this plaintiff shall charge to said Portsmouth Gas Company, and thereby inflict upon this plaintiff irremediable injury and damage.

## VII

This plaintiff says that the action of said The Public Utilities Commission of Ohio in entering its order of April 18, 1935, and its order of May 29, 1935, requiring this plaintiff to submit the valuation of its property to said Commission for the purpose of fixing the rate which it shall charge to said Portsmouth Gas Company, is entirely void; that the said provision of the law of the State of Ohio, as construed by said Commission, attempting to confer upon it the power to regulate the price at which this plaintiff shall sell its natural gas in interstate commerce, is



beyond the power of the Legislature of the State of Ohio or The Public Utilities Commission of Ohio, and is in violation of that part of Section 8 of Article 1 of the Constitution of the United States conferring upon the Congress of the [fol. 12] United States the power to regulate commerce with foreign nations and among the several States and with the Indian Tribes. That this plaintiff will be irreparably injured and damaged unless said The Public Utilities Commission of Ohio; said John W. Bricker, Attorney General of the State of Ohio, and the said Donald C. Power, Special Counsel for said Commission, are enjoined, inhibited and restrained from enforcing said orders against this plaintiff or inflicting penalties upon it for failure and refusal to obey said orders; that it is entitled to have such an injunction granted in this case; and that there is, as appears from the allegations hereinbefore made, a controversy between it and said The Public Utilities Commission of Ohio involving the right of said Commission to prescribe the rate which this plaintiff shall charge for the natural gas sold by it in interstate commerce; that it is entitled to have a declaration that the transaction of the sale of natural gas by it to the said Portsmouth Gas Company, involved herein, is interstate commerce, and that the same is not subject to be regulated by said defendant The Public Utilities Commission of Ohio; and that the order of said Commission requiring this plaintiff to submit the valuation and proof of the cost of producing said natural gas and of delivering it to said Portsmouth Gas Company, is null and void under the provisions of the Act of Congress of June 14, 1934, Judicial Code, Section 274-D (28 U. S. C. A., Section 400).

Plaintiff therefore prays:

1. That a writ of subpoena may issue against each of the above named defendants, and that they may be required to answer this bill.

2. That the orders of said The Public Utilities Commission of Ohio of April 18, 1935, and May 29, 1935, requiring this plaintiff to prove the cost of producing and delivering the natural gas furnished by it to the defendant Portsmouth Gas Company be declared null and void and of no effect.

3. That the said defendant The Public Utilities Commission of Ohio, the members thereof, the said John W. Bricker, Attorney General of the State of Ohio, and the

[fols. 13-14] said Donald C. Power, Special Counsel for said The Public Utilities Commission of Ohio, and each of them, be enjoined, inhibited and restrained from enforcing said orders against this plaintiff, and that the said defendant The Public Utilities Commission of Ohio be enjoined, inhibited and restrained from regulating or attempting to regulate the transactions between this plaintiff and the said defendant Portsmouth Gas Company under the contract referred to herein, and that, pending the determination of its right to such permanent injunction, an interlocutory injunction be granted in accordance with the foregoing.

4. That the said defendant The City of Portsmouth, a municipal corporation, be enjoined, inhibited and restrained from ~~from~~ prosecuting any proceeding for the purpose of abrogating or destroying the validity of the said contract between this plaintiff and the said Portsmouth Gas Company; and that a declaration may be made in this suit of the right of this plaintiff to have the performance of the said contract in accordance with its terms, under the provisions of the Act of Congress of June 14, 1934, Judicial Code, Section 274-D (28 U. S. C. A., Section 400).

5. To the end that immediate and irreparable loss, damage and injury may not result to the plaintiff pending the hearing of its motion and prayer for an interlocutory injunction, that a temporary restraining order may be made and entered by this court, inhibiting the said defendants, and each of them, their agents and employees, from enforcing or attempting to enforce said orders of said The Public Utilities Commission of Ohio against the plaintiff or its agents, officers or employees, or from, in any manner interfering with the plaintiff in the performance of the contract between it and the said Portsmouth Gas Company.

United Fuel Gas Company, by H. A. Wallace, President.

Freeman T. Eagleson, Columbus, Ohio; Harold A. Ritz, Charleston, West Virginia, Counsel for Plaintiff.

*Duly-sworn to by H. W. Wallace. Jurat omitted in printing.*

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[fol. 15] EXHIBIT "A" TO BILL OF COMPLAINT

This Agreement, made this 22nd day of October, 1931, between United Fuel Gas Company, A West Virginia cor-

poration, party of the first part, and Portsmouth Gas Company, an Ohio corporation, party of the second part;

Witnesseth:

Whereas, the said party of the second part is engaged in the business of supplying natural gas to the inhabitants of the City of Portsmouth, in the State of Ohio, and desires to secure a supply of natural gas for said purpose from the party of the first part, and has been securing such supply in the past under a contract which will expire on the 31st day of October, 1931;

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter contained, to be kept and performed by the parties hereto, the said parties mutually agree as follows:

First: United Fuel Gas Company agrees, subject to the qualifications contained in paragraph Second hereof, to furnish to the Portsmouth Gas Company, during the life of this agreement, at the measuring stations at which gas is now being delivered to the said Portsmouth Company by the said United Fuel Company, a sufficient supply of natural gas at all times to meet the requirements of the business of the Portsmouth Company, to be by it distributed and sold to its consumers, and to that end the United Fuel Company will in good faith exercise due diligence to furnish the same, the said United Fuel Company to have the control of the regulator and measuring stations through which said gas is delivered to the said Portsmouth Company.

Second: It is agreed, however, that the obligation of the United Fuel Company at any time to furnish and deliver gas under this contract shall be subordinate to all previous obligations assumed by it to furnish natural gas to others, including the following:

(a) Supplying consumers connected at any time directly to its distributing systems in West Virginia and Ohio;

(b) The performance of a contract for the sale of gas to the Ohio Fuel Supply Company, under which it is now delivering gas to said Company;

(c) The performance of a contract for the sale of gas for use in the City of Cincinnati and in the Cincinnati

District, under which contract it is now delivering gas for that purpose;

(d) The performance of a contract for the sale of gas to the Central Kentucky Natural Gas Company, dated November 1, 1912;

(e) The performance of a contract for the delivery of gas to the Louisville Gas & Electric Company dated July 5, 1913, as modified;

(f) The performance of a contract for the sale of gas to the Hope Natural Gas Company, dated August 25, 1916, as modified;

[fol. 16] (g) The performance of a contract for the delivery of gas to the Pittsburgh & West Virginia Gas Company at Cedarville, in exchange for gas delivered by said Company to the United Fuel Company.

(h) The performance of a contract for the sale of gas to the Warfield Natural Gas Company, dated the 28th day of June, 1923.

Third: The Portsmouth Gas Company agrees to pay to the United Fuel Gas Company for all gas delivered to it as aforesaid during the term of this contract, the price of thirty-seven (37) cents for each one thousand cubic feet, except that for the gas lost in distribution by the said Portsmouth Company only the sum of twenty-five (25) cents per thousand cubic feet shall be charged. The gas lost in distribution as aforesaid shall be determined by a comparison of the quantity of gas delivered to the said Portsmouth Company as shown by the meter readings at the measuring stations where said gas is delivered, with the records of the said Portsmouth Company showing the amount of gas sold by it, and for the purpose of making said comparison, the Portsmouth Company agrees to keep accurate records of all amounts of gas sold by it, and to allow the said United Fuel Company to have access to its books and records for the purpose of making said comparison. It is, however, distinctly understood and agreed that the amount of gas so to be charged for at the rate of twenty-five (25) cents as leakage, shall not in any one year exceed fifty million (50,000,000) cubic feet.

Fourth: The United Fuel Company shall provide proper meter or meters or other measuring devices for the purpose



of measuring the gas delivered under this contract, and such meter or meters or other measuring devices shall be read monthly and statements rendered on the 10th day of each month to the Portsmouth Company for the gas delivered during the preceding month. Such measuring devices shall at all reasonable times be open to inspection and test by the said Portsmouth Company. Should the said Portsmouth Company fail to pay any proper bill rendered for gas delivered under this contract within ten (10) days after the 10th day of the month following that in which the gas was delivered, then in that event, the said United Fuel Company shall have the right to declare this contract forfeited, at its option, and cease to deliver gas hereunder.

Fifth: This contract shall continue in force for the term and period of five (5) years, beginning with the 1st day of November, 1931.

Sixth: The said Portsmouth Company agrees that it will not hold the United Fuel Company liable for any failure in the supply of gas under this contract, provided the said United Fuel Company has used due diligence to prevent such failure.

Seventh: It shall be sufficient, for the purposes of this contract, that all notices to be given and bills to be sent shall be mailed to the Portsmouth Gas Company, at Portsmouth, Ohio, and to the United Fuel Gas Company, at Charleston, West Virginia.

Eighth: Said gas shall be compressed, if necessary, by the United Fuel Company, and the quantity thereof shall be computed on a ten (10) ounce pressure basis above 14.4 pounds atmospheric, according to Boyle's Law for the measurement of gas at varying pressures, and on a temperature basis of forty (40) degrees (F.) flowing and fifty (50) degrees (F.) storage, without further allowance for actual temperatures and barometric conditions.

Ninth: The United Fuel Gas Company hereby expressly reserves to itself and its assigns the right to extract the gasoline and other by-products from said gas before making delivery thereof hereunder.

In Testimony Whereof, the parties hereto have caused their respective corporate names to be hereunto subscribed by their proper officers, respectively, thereunto duly authorized, and their respective corporate seals to be hereunto affixed, all in duplicate.

Portsmouth Gas Company, By Ralph H. Beaton,  
President.

Attest: Otis H. Reyer, Secretary.

United Fuel Gas Company, By H. A. Wallace, President.

Attest: F. B. Jesser, Asst. Secretary.

STATE OF OHIO,

County of Franklin; To-wit:

I, Katherine C. Bergin, a Notary Public of said County, do certify that Ralph H. Beaton, who signed the writing hereto annexed for Portsmouth Gas Company, a corporation, bearing date the 22nd day of October, 1931, has this day, in my said County, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 31st day of October, 1931. My commission expires May 6, 1932. Katherine C. Bergin, Notary Public.

STATE OF WEST VIRGINIA,

County of Kanawha, to-wit:

I, J. J. Martin, a Notary Public of said County, do certify that H. A. Wallace, who signed the writing hereto annexed for United Fuel Gas Company, a corporation, bearing date the 22nd day of October, 1931, has this day, in my said County, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 3rd day of November, 1931. My commission expires May 2nd, 1940. J. J. Martin, Notary Public.

[fol. 18]      EXHIBIT "B" TO BILL OF COMPLAINT

Before The Public Utilities Commission of Ohio

No. 7750

In the matter of the complaint and appeal of The Portsmouth Gas Company to and from Ordinance Number 8, passed by the City of Portsmouth, Ohio, on February 24, 1932.

Motion of the City of Portsmouth, Ohio, to make the United Fuel and Gas Company a party to this proceeding and to have the Utilities Commission of Ohio inquiry into and determine the legality and reasonableness of the charge for natural gas sold by The United Fuel & Gas Company to the Portsmouth Gas Company of Portsmouth, Ohio for distribution in said city.

The City of Portsmouth, Ohio respectfully makes the following representations in behalf of its motion and application herein:

1. The Portsmouth Gas Company, complainant and appellant herein is a public utility, engaged in the business of distributing to the City of Portsmouth and its inhabitants and industries natural gas. All of which said company purchases from the United Fuel and Gas Company for these expressed purposes.

2. The United Fuel and Gas Company is a corporation and public utility, having various offices and places of business in the State of Ohio. It has for many years and is at present supplying The Portsmouth Gas Company with natural gas for distribution within the City of Portsmouth, and has its principal office and place of business in Scioto County at 202 Ohio Avenue, New Boston, Ohio. It is also engaged in supplying and distributing to consumers in various localities, natural gas as well as supplying and delivering to various other companies in Ohio, natural gas for distribution for heating, lighting and power purposes.

3. The Council of The City of Portsmouth, Ohio on the 24th day of February, 1932, passed Ordinance Number 8, fixing the maximum rate to be charged by The Ports-

mouth Gas Company for distribution of natural gas in said city at forty-five cents (45¢) per thousand cubic feet. Said maximum charge so fixed provided for a reduction of five cents (5¢) per thousand cubic feet if monthly bills were paid within ten days after the same were rendered by said company. Said ordinance further provided for a minimum charge to each customer of fifty cents (50¢) per month where gas so used by the customer did not equal or exceed the amount of fifty cents (50¢) at the rate so fixed by said ordinance.

The said The Portsmouth Gas Company has appealed from such ordinance and has executed and delivered to the Utilities Commission a bond whereby its said rates so fixed by said ordinance have been suspended pending the determination of the justness and reasonableness of the rates so fixed in said ordinance.

[fol. 19] 4. The said The Portsmouth Gas Company has for some time and is now purchasing its natural gas, for supply and distribution within the City of Portsmouth, Ohio, from the United Fuel and Gas Company. The price paid by the said The Portsmouth Gas Company to the United Fuel and Gas Company for gas to be distributed in said city, under an existing contract heretofore filed in these proceedings, constitute a large part of the price charged for gas distributed by The Portsmouth Gas Company to consumers within said city. It is an essential factor in determining in this proceeding the reasonableness of the maximum rates fixed by Ordinance Number 8, passed February 24, 1932, herein referred to or for any other rates being now charged to consumers within the City of Portsmouth, Ohio.

5. The rates heretofore or now paid by The Portsmouth Gas Company for natural gas distributed by it in the City of Portsmouth, Ohio are not lawful for the reason that although such rates are collected by The United Fuel and Gas Company and although such company is prohibited by law from collecting any rate for such services until it shall have filed with the Utilities Commission of Ohio its schedule and had the same approved by said Commission. Nevertheless The United Fuel and Gas Company has not filed any such rates with this Commission nor at any time sought or had the approval thereof, nor any determina-

tion of the justness or reasonableness of the rates so charged.

6. Furthermore, The Portsmouth Gas Company under date of October 22nd, 1931, entered into an unreasonable written contract with The United Fuel and Gas Company without any approval of The Utilities Commission of Ohio. Said contract was to continue in force and effect for a period of five years from the date thereof and provided for the payment of thirty-seven cents (37¢) per thousand cubic feet for gas delivered at the gate of the city and for distribution by said The Portsmouth Gas Company. Said price so fixed in said contract is exorbitant and is reflected in the retail price charged by The Portsmouth Gas Company to the consumers of said city.

A copy of said contract and agreement is hereto attached marked "exhibit A" for the information of this Commission.

7. The charges so specified in the agreement referred to in Section 6 and made a part hereof are substantially in excess of charges heretofore approved by this Commission and based on the cost of production and delivery of gas in this locality either for wholesale or distribution, that they are exorbitant, unreasonable, discriminatory and result in the consumer being forced to pay an unreasonable rate for gas distributed.

8. The agreement herein referred to in Section 6 between The Portsmouth Gas Company and The United Fuel and Gas Company fixed the gate rate without the approval of this Commission, disregards and evades the jurisdiction of this Commission and the laws of the State of Ohio, limiting public utilities to reasonable compensation for services rendered by them. The conditions of said contract now being enforced by the United Fuel and Gas Company fixed the cost of gas at the gate of said city in substance increases unreasonably the distribution cost of gas within the city of Portsmouth.

9. This agreement, if binding upon The Portsmouth Gas Company, would permit The United Fuel and Gas Company through The Portsmouth Gas Company as agent and a medium for collection to indirectly charge to the consumers of Portsmouth an unreasonably high rate for [fol. 20] natural gas service, and to discriminate against



said city and its inhabitants in its charges for natural gas as compared with those charged in other municipalities of Ohio. This arbitrarily limits and destroys, by mere contract between distributing and wholesale utilities, any power of this Commission to establish reasonable rates for public utilities' service. It further prohibits the city from regulating prices which utility companies may charge in said city. It further allows and permits the said The United Fuel and Gas Company and the distributing company, purchasing from it, to remove themselves from the jurisdiction of The Utilities Commission or the laws of Ohio and to impose on the general public any rates they might care to charge and fix by contract between them.

10. The Portsmouth Gas Company by signing this agreement with The United Fuel and Gas Company and its failure to take any action before the court or elsewhere has become a party to the imposing on the consumers of Portsmouth this unreasonable and high rate charged for natural gas distributed to the consumers within said city. Said The Portsmouth Gas Company will continue to pay The United Fuel and Gas Company this unreasonable high rate for natural gas and the same will continue to be reflected in the retail rate charged to consumers of said city.

11. If this Commission fails to determine the unreasonableness of the charge as provided for in the now existing contract between The Portsmouth Gas Company and The United Fuel Gas Company it will be unable to reach a final, complete or lawful determination of the reasonableness of the rates fixed in Ordinance Number 8, passed by the City of Portsmouth, Ohio, February 24th, 1932, or any other rate being now charged by the Portsmouth Gas Company for services within said city.

12. The United Fuel and Gas Company is in possession of all facts pertinent to the determination of the reasonableness of the rate it is charging The Portsmouth Gas Company, and if it be made a party hereto and required to produce such records and facts, both companies involved will have an opportunity to be heard on the unreasonableness of both the gate rate and the distribution rate and without further delay or inconvenience to the parties hereto,

this Commission could fix a reasonable gate and distribution charge.

There is also pending before this Commission a separate complaint filed by The City of Portsmouth and Joseph L. Kountz against The United Fuel and Gas Company, and against The Portsmouth Gas Company complaining that the rate being charged by The United Fuel and Gas Company to the Portsmouth Gas Company is unreasonable and discriminatory. The determination of the unreasonableness of Ordinance Number 8 in this proceeding is based partly upon the unreasonableness of the charge to be paid by The Portsmouth Gas Company for gas to be re-sold by it to the City of Portsmouth and its consumers, and will therefore raise and dispose of many of the same issues as will be material in this case.

WHEREFORE, The City of Portsmouth moves and prays this Commission to issue the following order:

I. That The Portsmouth Gas Company establish in this case the legality of the price payable by it to The United Fuel and Gas Company or any other company from which it directly or indirectly purchases natural gas.

II. That the said The Portsmouth Gas Company establish in this case a purchase price payable by it for natural gas to The United Fuel and Gas Company which conforms to some lawful rate charged by The United Fuel and Gas Company on file with and approved by this Commission [fol. 21] or that The Portsmouth Gas Company establish the reasonableness of the charge for natural gas paid to The United Fuel and Gas Company.

III. That The United Fuel and Gas Company be made a party to this proceeding.

IV. That The United Fuel and Gas Company be required to file with this Commission and obtain the approval or the determination by this Commission of the justness and reasonableness of any rate for natural gas sold and delivered to The Portsmouth Gas Company or to be sold and delivered to it for the sale and distribution by said The Portsmouth Gas Company within the limits of the City of Portsmouth, Ohio.

V. That any complaint pending before this Commission against rates charged by The United Fuel and Gas Company to The Portsmouth Gas Company for natural gas distributed in the City of Portsmouth, Ohio, by The Portsmouth Gas Company or to the inhabitants of said city be consolidated with this proceeding in order that the evidence and legal arguments presented in this proceeding shall also be deemed to have been presented in that case.

VI. That such investigation be made, on the initiative of this Commission or otherwise, as is necessary or just in the premises so that this Commission shall ascertain fully and promptly the lawful rates to be paid by The Portsmouth Gas Company to The United Fuel and Gas Company for natural gas for distribution in the City of Portsmouth or to the inhabitants of said city, and so as to require conformity to all such orders as shall be issued by this Commission.

Respectfully submitted,

(S.) W. L. Dickey, Director of Law of the City of Portsmouth, Ohio.

(NOTE: The contract and agreement filed as "Exhibit A" with the foregoing motion is the same as Exhibit "A" filed with the bill of complaint herein, and is therefore omitted from this print.)

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[fol. 22] EXHIBIT "C" TO BILL OF COMPLAINT

No. 7750

Before The Public Utilities Commission of Ohio

In the matter of the complaint and appeal of the Portsmouth Gas Company to and from Ordinance No. 8, passed by the City of Portsmouth, Ohio, on February 24, 1932

Motion of the City of Portsmouth, Ohio, to make United Fuel Gas Company a party to said proceeding

The answer of United Fuel Gas Company to the motion filed in the above proceeding, having for its purpose making it a party thereto and prescribing the rate to be charged



by it for natural gas delivered and to be delivered by it to the said Portsmouth Gas Company.

This respondent, for answer to said motion, says:

1. That it is true that the Portsmouth Gas Company is a public utility engaged in the business of distributing natural gas to the inhabitants of the City of Portsmouth, and that it is true that said gas is purchased by the said Portsmouth Gas Company from this respondent.

2. That it is true that this respondent has been, for many years, supplying the Portsmouth Gas Company with natural gas for distribution within the City of Portsmouth, but this respondent has no principal office in Scioto County, Ohio, as stated in the second paragraph of said motion. That it is true that it does distribute some natural gas to some domestic consumers in New Boston and Ironton, Ohio, but the business of supplying these consumers has no connection with the sales of natural gas to the said Portsmouth Gas Company.

3. This respondent is advised that it is true that the Common Council of the City of Portsmouth, on the 24th day of February, 1932, passed Ordinance No. 8, prescribing the rates for natural gas mentioned in paragraph three of said motion; and it is likewise true, as this respondent is advised, that the said Portsmouth Gas Company has appealed from said ordinance and executed a bond, under which it is collecting the rates in effect at the time of and prior to the passage of said ordinance.

4. That it is true, as hereinbefore stated, that the said Portsmouth Gas Company purchases the natural gas delivered by it to its consumers from this respondent, and that said gas is purchased under a contract entered into between the said Portsmouth Gas Company and this respondent; and that it is likewise true, as must be self-evident, that the price paid for said gas is a material part of the charge made by said Portsmouth Gas Company to its consumers.

5. This respondent denies that there is any requirement of any law of the state of Ohio imposing upon it the obligation to file any schedule of rates covering the sales and deliveries of gas by it to the said Portsmouth Gas Company. It says that the gas sold and delivered by it to said Portsmouth Gas Company is in pursuance of a contract

entered into by it as set up in the motion herein, and that prior to the making of this contract there was another contract which had expired by its terms; that all of said gas is produced or purchased by this respondent in the States of Kentucky and West Virginia, and is transported by it through transmission lines, under high pressure, to and [fol. 23] across the Ohio River at the City of Portsmouth and delivered to the said Portsmouth Gas Company out of its high pressure lines at said point; that said natural gas at no time comes to rest while in the custody or possession of this respondent in the State of Ohio; that the same, therefore, constitutes interstate commerce, and that all of the transaction in regard thereto are dealings in interstate commerce; and that no law of the State of Ohio, properly construed, attempts to prescribe rates or authorize any tribunal of the State of Ohio to prescribe rates for such dealings in such interstate commerce, and that if any law did so authorize the Public Utilities Commission of Ohio, or any other tribunal, to regulate or fix rates for such business, the same would be invalid and of no effect and in violation of the commerce clause of the Constitution of the United States.

It is true, therefore, that this respondent has filed no schedule of rates covering the business done by it with the said Portsmouth Gas Company, for the reason that there is no law of the State of Ohio requiring that the same be filed.

6. It is true, as alleged in the sixth paragraph of said motion, that this respondent entered into a contract with the Portsmouth Gas Company for the sale of gas to it (the said Portsmouth Gas Company), but it denies emphatically that said contract is unreasonable. On the contrary, it says that the said contract was made by it and the said Portsmouth Gas Company after mature and full negotiation, and this respondent avers that said contract is in all respects fair and reasonable. It is true that it has not secured the approval of the Public Utilities Commission of Ohio of said contract; that, as before stated there is no law of the State of Ohio that confers upon the Public Utilities Commission of Ohio the power to regulate the interstate commerce engaged in by this defendant as aforesaid, and if the statutes of the State of Ohio can be construed and are construed as requiring the approval of such contracts by the Public Utilities Commission of Ohio and as

conferring upon the Public Utilities Commission of Ohio the power to regulate the price of the gas delivered in interstate commerce by this respondent to the said Portsmouth Gas Company, then such statutes are invalid and of no force and effect and violate the commerce clause of the Constitution of the United States.

7. This respondent denies that the said charges made by it for natural gas to the said Portsmouth Gas Company are exorbitant, unreasonable or extortionate, and denies that the same are in excess of charges made under similar circumstances for like quantities of such natural gas.

8. This respondent denies that it has attempted to evade or is evading compliance with any laws of the said State of Ohio. It says that the Public Utilities Commission of Ohio, as before stated, has no jurisdiction to prescribe rates at which it shall sell its natural gas in interstate commerce, for the reason that the transactions between it and the said Portsmouth Gas Company are not subject to regulation by said Public Utilities Commission.

9. This respondent denies that the said Portsmouth Gas Company is in the remotest sense a medium or agent of this respondent for the collection of money from the citizens of the City of Portsmouth. It avers that the transactions between it and the said Portsmouth Gas Company are free from any fraud or collusion or of any purpose upon its part or upon part of the said Portsmouth Gas Company to do [fol. 24] otherwise, in so far as the said Portsmouth Gas Company is concerned, than to secure a supply of gas for its consumers at the very best price at which the same can be secured. It denies that the said contract between it and the said Portsmouth Gas Company in any way abridges or denies the right of the Public Utilities Commission of Ohio to regulate the rates of public utilities. It denies that said contract permits the Portsmouth Gas Company and this respondent, or either of them, to impose upon the citizens of Portsmouth any rates which they may see fit. On the contrary, it says that the Public Utilities Commission of Ohio has plenary power to regulate the rates and charges which the said Portsmouth Gas Company may make to its consumers of natural gas.

10. It denies that this respondent or the said Portsmouth Gas Company are making any unreasonable charge against

the consumers of the City of Portsmouth by reason of said purchase or the failure to submit said contract for the approval of the Public Utilities Commission. It says that it believes it is true that the said Portsmouth Gas Company will continue to pay for the said gas the rate prescribed in said contract, and that it is the intention of this respondent to insist upon the performance of said contract in accordance with its terms.

11. This respondent denies that the Public Utilities Commission of Ohio is unable to determine correct and proper rates for natural gas service in the City of Portsmouth by reason of said contract, or that the said sale and delivery of said gas by this respondent to the said Portsmouth Gas Company in interstate commerce, as aforesaid, is any impediment to the said Public Utilities Commission in the performance of its duty in the State of Ohio.

12. This respondent denies that the Public Utilities Commission of Ohio is given by law any power or jurisdiction to determine at what price this respondent shall sell gas to the said Portsmouth Gas Company, and it avers that if the statutes of the State of Ohio attempt to confer such power, then said statutes and laws so attempting to confer such power are invalid and of no effect, because the same violate the commerce clause of the Constitution of the United States conferring upon the Congress of the United States the exclusive power to regulate interstate commerce.

13. This respondent denies the power or right of said Public Utilities Commission of Ohio to regulate the contract price at which gas shall be sold by this respondent to the said Portsmouth Gas Company. It submits that the said transaction constitutes and is interstate commerce, and that the regulation thereof is exclusively vested in the Congress of the United States by the Constitution of the United States; that no law of the State of Ohio attempts to confer this power upon the Public Utilities Commission of Ohio, when the same is properly construed; that if any statute or law of the State of Ohio is construed as attempting to confer such power, the same, to that extent, is invalid and void as violating the commerce clause of Constitution of the United States conferring exclusive power upon the Congress of the United States to regulate such commerce.

This respondent says that it should be dismissed from this proceeding and allowed to conduct its business with the said Portsmouth Gas Company under the contract aforesaid and under such regulations as may be properly made by competent authority.

United Fuel Gas Company, By Harold A. Ritz, General Counsel.

Freeman T. Eagleson, Harold A. Ritz, Attorneys.

[fol. 25] EXHIBIT "D" TO BILL OF COMPLAINT

No. 7750

Before the Public Utilities Commission of Ohio

In the matter of The Portsmouth Gas Company's complaint of, and appeal from, Ordinance No. 8, Year 1932, passed by the Council of the City of Portsmouth, Scioto County, State of Ohio, February 24, 1932, "fixing the rate or rates to be charged to consumers for natural gas distributed by The Portsmouth Gas Company, a corporation distributing natural gas in the City of Portsmouth, Ohio"

This day after full argument by counsel, this matter came on for consideration upon the motion of the City of Portsmouth, filed September 16, 1933, and the motion embodied in the answer of The United Fuel Gas Company to be dismissed as a party to this proceeding.

The Commission, being fully advised in the premises, and coming first to consider said motion of said City of Portsmouth, finds that the said motion, insofar as it asks

That the said The Portsmouth Gas Company establish in this case a purchase price payable by it for natural gas to The United Fuel Gas Company which conforms to some lawful rate charged by The United Fuel Gas Company on file with and approved by this Commission;

That the United Fuel Gas Company be required to file with this Commission and obtain the approval or the determination by this Commission of the justness and reasonableness of any rate for natural gas sold and delivered to The Portsmouth Gas Company or to be sold and delivered to it for the sale and distribution by said The Portsmouth



Gas Company within the limits of the City of Portsmouth, Ohio;

That any complaint pending before this Commission against rates charged by The United Fuel Gas Company to The Portsmouth Gas Company for natural gas distributed in the City of Portsmouth, Ohio, by The Portsmouth Gas Company or to the inhabitants of said city be consolidated with this proceeding in order that the evidence and legal arguments presented in this proceeding shall also be deemed to have been presented in that case, and

That such investigation be made, on the initiative of this Commission or otherwise, as is necessary or just in the premises so that this Commission shall ascertain fully and promptly the lawful rates to be paid by The Portsmouth Gas Company to The United Fuel Gas Company for natural gas for distribution in the City of Portsmouth or to the inhabitants of said city, and so as to require conformity to all such orders as shall be issued by this Commission, should be, and hereby the same is overruled.

To which action of the Commission in overruling certain portions of its motion, the City of Portsmouth, Ohio, then excepted, here now excepts and its exceptions here are noted of record.

And the Commission coming now to consider said motion in the following respects, finds that the said motion, insofar as it asks

That The Portsmouth Gas Company establish in this case the legality of the price payable by it to The United Fuel [fol. 26] Gas Company or any other company from which it directly or indirectly purchases natural gas;

That The Portsmouth Gas Company establish the reasonableness of the charge for natural gas paid to The United Fuel Gas Company, and

That the United Fuel Gas Company be made a party to this proceeding,

should be, and hereby the same is sustained.

To which action of the Commission in sustaining said motion in said respects, said The Portsmouth Gas Company and said The United Fuel Gas Company each then excepted, here now except, and their exceptions here are noted of record.

It is, therefore,

Ordered, That said The United Fuel Gas Company be, and hereby it is made a party to this proceeding and sub-

jected to the jurisdiction of this Commission in all matters which may legally arise herein. It is, further

Ordered, That said The United Fuel Gas Company be, and hereby it is notified, directed and required within ten days herefrom to file with this Commission a copy of the articles of agreement or contract by and with The Portsmouth Gas Company whereunder it is supplying said The Portsmouth Gas Company natural gas for distribution in the City of Portsmouth, Ohio.

To which order of the Commission, said The United Fuel Gas Company then excepted, here now excepts, and its exceptions here are noted of record.

The Commission coming now to consider the said motion of said The United Fuel Gas Company to be dismissed as a party to this proceeding finds that said motion is not well taken upon any ground thereof and does overrule the same upon each and every ground.

To which action of the Commission in overruling its said motion to be dismissed as a party to this proceeding, said The United Fuel Gas Company then excepted, here now excepts and its exceptions here are noted of record.

The Public Utilities Commission of Ohio, ———,  
Chairman, Frank W. Geiger, Charles F. Schaber,  
Commissioner.

Dated at Columbus, Ohio, this 18th day of June, 1934.

Chairman E. J. Hopple does not concur.

A True Copy:

C. H. Knisley, Secretary.

## [fol. 27] EXHIBIT "E" TO BILL OF COMPLAINT

Before The Public Utilities Commission of Ohio

No. 7759

In the matter of The Portsmouth Gas Company's complaint of, and appeal from, Ordinance No. 8, Year 1932, passed by the Council of the City of Portsmouth, Scioto County, State of Ohio, February 24, 1932, "fixing the rate or rates to be charged to consumers for natural gas distributed by The Portsmouth Gas Company, a corporation distributing natural gas in the City of Portsmouth, Ohio."

This day, after full hearing and argument by counsel, this matter came on for consideration upon the complaint and appeal by The Portsmouth Gas Company from the Ordinance passed February 24, 1932, by the Council of the City of Portsmouth, Ohio, fixing and prescribing as maxima the following rates for the furnishing of natural gas service to the citizens, public grounds and buildings of the City of Portsmouth, Ohio for the duration of the franchise of said The Portsmouth Gas Company passed June 21, 1899, to wit:

45¢ per 1,000 cubic feet with a discount of 5¢ per 1,000 cubic feet, if bills are paid within ten days after the rendition of the monthly statement by the gas company.

Monthly minimum charge . . . . . 50 cents

and the testimony and exhibits offered and introduced in evidence upon such hearing and the argument of counsel.

The appellant elected to and under an undertaking duly filed herein has charged during the pendency of this proceeding the following schedule of rates which was in effect immediately prior to the effective date of the ordinance complained of and appealed from:

First 1,000 cu. ft. or less per month	85¢
Over 1,000 cu. ft. per month	60¢ per M cu. ft.
Discount for prompt payment	5¢ per M cu. ft.



The appellant produces no gas and purchases from the United Fuel Gas Company all of the gas which it distributes under a contract which, with an adjustment for leakage, prescribes a price of 37 cents per 1,000 cubic feet.

By order, made and entered in this proceeding on June 18, 1934, the said United Fuel Gas Company was made a party and directed to file a copy of the contract whereunder it supplies gas to the appellant. No proceeding was instituted seeking a reversal of this order.

The appellant, The Portsmouth Gas Company, offer in evidence its record tending to show that the cost of rendering service in the City of Portsmouth, exclusive of cost of purchasing gas, taxes and the necessary allowance for depreciation, for the fiscal years ended February 29, 1932, and February 28, 1933 was as follows:

[Vol. 28]	1932	1933
Transmission and Distribution:		
Operation.....	\$15,492.04	\$16,359.16
Maintenance.....	36,147.50	19,900.51
Commercial Expense.....	19,199.85	19,077.12
New Business Expense.....	16,416.77	10,394.05
General Expense:		
Operation.....	46,628.43	41,948.81
Maintenance.....	1,372.45	1,246.02
	<u>\$135,257.04</u>	<u>\$108,925.67</u>

The United Fuel Gas Company has presented no evidence tending to show the cost of supplying gas wholesale to The Portsmouth Gas Company.

The Commission coming first to determine the valuation of the property of the Appellant, The Portsmouth Gas Company, actually used and useful, for the furnishing of natural gas service, by said company, to consumers and to the public in the City of Portsmouth, Ohio, and after considering the evidence and exhibits offered at said hearing, and having completed an independent inventory and valuation of said property, and being fully advised in the premises, finds and ascertains the value of the several kinds and classes of the property of The Portsmouth Gas Company used and useful for the convenience of the public and for the natural gas service to its consumers and to the public in the City of Portsmouth, Ohio, and of said property as a whole, as of February 24, 1932, to be as set forth in the following summary, (the grand totals

of which are reproduction costs \$761,939; depreciation \$94,151, and present value \$667,788.) viz:

	Repro- duction Cost New	Depreci- ation	Present Value
District Regulator Structures .....	\$1,268 00	\$175 00	\$1,093 00
Gas Receivers & District Regulators .....	5,647 00	918 00	4,729 00
Distribution Line Equipment .....	359,498 00	49,667 00	309,831 00
Service Line Equipment .....	151,201 00	17,237 00	133,964 00
Meters .....	93,064 00	13,893 00	79,171 00
Meter Installations .....	15,884 00	2,353 00	13,531 00
General Office Land .....	13,073 00	0 00	13,073 00
Other General Land .....	5,178 00	0 00	5,178 00
General Office Structures .....	40,177 00	2,348 00	37,829 00
General Office Equipment .....	6,723 00	823 00	5,900 00
General Store & Shop Equipment .....	595 00	76 00	519 00
General Garage Equipment .....	2,129 00	1,202 00	927 00
General Tools & Implements .....	841 00	210 00	631 00
Other General Equipment .....	540 00	0 00	540 00
General Overheads .....	31,992 00	5,249 00	26,743 00
Working Capital & Material and Sup- plies .....	34,129 00	0 00	34,129 00
Total .....	\$761,939 00	\$94,151 00	\$667,788 00

[fol. 29] And the Commission, coming now to consider the said complaint and appeal of The Portsmouth Gas Company of and from the said ordinance, passed by the Council of the City of Portsmouth, Ohio, on February 24, 1932, fixing and prescribing the maximum prices to be charged for natural gas service for public and private consumption in the City of Portsmouth, Ohio, being fully advised in the premises, and having caused an appraisement to be made and having ascertained and hereinbefore determined and fixed the value of all of the property of said company actually used and useful for the convenience of the public in the furnishing of natural gas for public and private consumption in the said City of Portsmouth, Ohio, excluding therefrom the value of any franchise or right to own, operate or enjoy the same (exclusive of any tax or annual charge actually paid to any political subdivision of the state or county) as a consideration for the grant of such franchise or right, and exclusive of any value added thereto by reason of a monopoly or merger, and having given consideration to the necessity of making reservations from income for surplus, depreciation and contingencies, and having taken into consideration all other matters which were deemed proper, further finds:

That the following adjustments by the elimination of improper System Charges and the equalization of Mainte-

nance Expenses are necessary to determine the actual operating expenses, exclusive of cost of purchased gas, taxes and allowance for depreciation, to determine the cost of the rendering of the service of The Portsmouth Gas Company for the fiscal years ended February 29, 1932, and February 28, 1933, respectively.

	1932	1933
Transmission and Distribution:		
Operation .....	\$30.04*	\$121.72*
Maintenance .....	3,716.56*	6,071.94
Commercial Expense .....	14.92*	15.56*
New Business Expense .....	239.96*	223.69*
General Expense:		
Operation .....	20,546.53*	18,957.15*
	<u>\$24,548.01*</u>	<u>\$13,246.18*</u>

(\*Figure in red.)

That the said City of Portsmouth, Ohio and the appellant, The Portsmouth Gas Company have agreed that there shall be allowed the appellant herein an earning or return of  $6\frac{1}{2}$  per centum per annum upon the valuation herein found by the Commission to be the proper rate base;

That a reasonable annual depreciation allowance to be herein made to said The Portsmouth Gas Company shall be a sum equivalent to one and one-half per centum of the value of its depreciable property;

That, adjusted by the Commission as aforesaid, the actual operating expense of the appellant (exclusive of the cost of purchased gas) for the furnishing of its service in [fol. 30] the City of Portsmouth, for the aforesaid fiscal periods, and with the proper allowance for taxes, depreciation and return, is as follows, to-wit:

	1932	1933
Transmission and Distribution:		
Operation .....	\$15,462.00	\$16,237.44
Maintenance .....	32,400.90	25,972.45
Commercial Expense .....	19,184.93	19,061.56
New Business Expense .....	16,176.81	10,170.36
General Expense:		
Operation .....	26,081.90	22,991.66
Maintenance .....	1,372.45	1,246.02
	<u>\$110,709.03</u>	<u>\$95,679.49</u>
Taxes .....	20,015.39	20,015.39
Depreciation .....	9,231.13	9,231.13
Return .....	43,406.24	43,406.24
	<u>\$184,019.15</u>	<u>\$169,918.25</u>

That, for the same fiscal periods, the actual revenues of The Portsmouth Gas Company at the schedule of rates which it has collected under the undertaking duly given herein, were the sums of \$459,560.01 and \$413,035.16, respectively, from which were available, after the payment of the aforesaid operating expenses, taxes, depreciation charges and return, the respective sums of \$276,198.22 and \$244,702.91 for the purchase of gas, or a rate of 33 cents per 1,000 cubic feet:

That, for the same fiscal periods, the revenues of The Portsmouth Gas Company at the schedule of rates fixed and prescribed by said ordinance, would have been the sums of \$305,648.00 and \$275,130.80, respectively, from which, with the same deductions, would have been available for purchase of gas the respective sums of \$121,628.85 and \$105,918.23, or a rate of 14.36 cents per 1,000 cubic feet, and

That, therefore, the rates and charges fixed and prescribed by said ordinance are manifestly unjust, unreasonable and insufficient to yield reasonable compensation for the service of said The Portsmouth Gas Company; ought not to be ratified or confirmed and that reasonable and just rates and charges should be substituted therefor.

The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this Commission.

[fol. 31] The Commission further finds that, in the absence of proof by the United Fuel Gas Company of a just and reasonable rate or charge to be maintained, imposed, charged and collected by it for the furnishing of natural gas to The Portsmouth Gas Company for distribution to consumers for public and private use in said City, it is unable to determine the just and reasonable rates to be substituted for the rates and charges fixed and prescribed by said ordinance which it has found herein to be unjust and unreasonable. It is, therefore,

Ordered, That the said United Fuel Gas Company be, and hereby it is notified, directed and required to proceed, forthwith, and with all diligence to prepare and, within ninety

days from the date hereof, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio, in conformity to the provisions of the General Session Order of this Commission adopted and promulgated under date of March first, 1934. It is, further,

Ordered, That this matter be continued for the receipt and consideration of such presentation by the United Fuel Gas Company and the making of such further and other order or orders herein as may be necessary and proper in the premises.

The Public Utilities Commission of Ohio.

E. J. Hopple, Chairman. Charles F. Schaber, R. D. Williams, Commissioners.

Dated at Columbus, Ohio, this 18th day of April, 1935.

A true copy: /s/ C. H. Knisley, Secretary.

[fol. 32]. EXHIBIT "F" TO BILL OF COMPLAINT

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 7750

In the Matter of The Portsmouth Gas Company's complaint of, and appeal from, Ordinance No. 8, Year 1932, passed by the Council of the City of Portsmouth, Scioto County, State of Ohio, February 24, 1932, "fixing the rate or rates to be charged to consumers for natural gas distributed by The Portsmouth Gas Company; a corporation distributing natural gas in the City of Portsmouth, Ohio."

#### PETITION FOR REHEARING

To the Public Utilities Commission of Ohio:

The undersigned, United Fuel Gas Company, respectfully prays for a rehearing of the order of the Commission entered on the 18th day of April, 1935, in which among other things, it is provided that the natural gas supplied by the United Fuel Gas Company to the Portsmouth Gas Company



for resale to consumers in the City of Portsmouth, is furnished as a public utility within the meaning of Section 614-2 of the General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this Commission, and requiring the undersigned to proceed with all due diligence to prepare and present all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged to the Portsmouth Gas Company by it for the furnishing of such natural gas.

This petitioner prays that it may have a rehearing of said order, and it also prays that upon said rehearing the said Commission will make specific findings of fact, under the evidence introduced in this case, as follows:

First. That the gas sold by this petitioner to the Portsmouth Gas Company is all produced in the States of West Virginia and Kentucky and is transported by constant flow, through pipe lines, from the said States of West Virginia and Kentucky into the State of Ohio, where it is delivered to the said Portsmouth Gas Company, and is, therefore, interstate commerce.

Second. That this petitioner, United Fuel Gas Company, and the Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest, neither has any associate or parent company of either of said Companies, United Fuel Gas Company and the Portsmouth Gas Company, any such inter-relations, but the said two Companies are entirely separate, distinct and independent of each other and are so operated.

These facts clearly appear from the evidence and are not in any wise disputed, and we submit that the Commission should make specific findings upon these questions, inasmuch as they are the main questions involved in this case.

The undersigned petitioner controverts the right of the Public Utilities Commission of Ohio to prescribe the rate at which petitioner shall furnish gas to the Portsmouth Gas Company under the contract which it has with said [fol. 33] Company, for the reasons heretofore stated in its answer herein. It does not question the right of said Commission to call upon this petitioner for such evidence and facts as may be in its possession which may show or tend to show what would be a reasonable rate to be charged for

gas to the consumers in the City of Portsmouth, and it offers to furnish to the Commission such facts and evidence as may be desired, or to permit any officers or agents of the Public Utilities Commission of Ohio to ascertain such facts and evidence as may be desired from its records and books for the purpose aforesaid, but denies and protests the right or power of said Commission to fix the rates at which petitioner shall sell the gas which it transports into the State of Ohio and delivers to the Portsmouth Gas Company.

Petitioner also says that said Commission should specifically declare, if it is its judgment, that it has or has not power to regulate the price, and that it intends to or does not intend to regulate said price and fix the same, and that it has or has not the right to compel this petitioner to continue to furnish gas to the said Portsmouth Gas Company at such rate as may be fixed by the said Public Utilities Commission of Ohio, and that it intends to compel this petitioner to furnish said gas at such rate as it may prescribe, or that it does not intend to do so.

This petitioner prays that the said order may be reheard, and that the Commission may make specific findings in accordance with the foregoing.

Dated this 14th day of May, 1935.

Respectfully submitted, United Fuel Gas Company,  
By Counsel.

Freeman, T. Eagleson, Harold A. Ritz, Counsel for United Fuel Gas Company.

[fol. 34] EXHIBIT "G" TO BILL OF COMPLAINT

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 7750

In the matter of The Portsmouth Gas Company's complaint of, and appeal from, Ordinance No. 8, Year 1932, passed by the Council of the City of Portsmouth, Scioto County, State of Ohio, February 24, 1932, "fixing the rate or rates to be charged to consumers for natural gas distributed by The Portsmouth Gas Company, a corporation distributing natural gas in the City of Portsmouth, Ohio."

This day, after due notice to all parties in interest, this matter came on to be heard and was heard upon the applica-

tion of The United Fuel Gas Company, asking, for the reasons and upon the grounds set forth therein, a rehearing with respect to the matters and things decided and determined by the findings and order made and entered herein upon April eighteenth, 1935, and the argument of counsel.

Whereupon, by stipulation of the parties, the City of Portsmouth, Ohio, and The United Fuel Gas Company, it is,

Ordered, That the findings made and entered herein upon April eighteenth, 1935, be, and hereby the same are supplemented with the following additional findings of fact, to-wit:

That the gas being delivered to The Portsmouth Gas Company, and which has been delivered to it under the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the States of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the State of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distribution system supplying the town of New Boston, in the State of Ohio, and the City of Ironton, in the State of Ohio, and that the distribution of natural gas in said town of New Boston and the said City of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company through a distribution system owned by said The United Fuel Gas Company; and

That the United Fuel Gas Company and The Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company of either of said companies, The United Fuel Gas Company and The Portsmouth Gas Company, any such relation, but the two companies are entirely separate and distinct from each other and are so operated.

[fol. 35] The Commission further finds that the following findings set forth and adopted in said findings as so adopted upon April eighteenth, 1935, to-wit:

"The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within

the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this Commission."

should be, and hereby the same is modified, amended and supplemented to read as follows, to-wit:

"The Commission further finds that the furnishing of natural gas by the United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission."

The Commission, coming now to consider said application for such rehearing, and being fully advised in the premises, and having hereinbefore, upon the stipulation of said parties, adopted the aforesaid two supplemental findings of fact and amended said findings as aforesaid, finds that sufficient cause has not been made to appear in said application or the argument of counsel for a rehearing upon the said findings, as so supplemented, and the order so made and entered herein as aforesaid. It is, therefore, further,

Ordered, That the said application of said The United Fuel Gas Company, asking, for the reasons and upon the grounds set forth therein, a rehearing with respect to the matters and things decided and determined by the findings (supplemented as aforesaid) and order made and entered herein upon April eighteenth, 1935, be, and hereby the same is denied.

To which order of the Commission denying its said application for such rehearing, said The United Fuel Gas Company then excepted, here now excepts and its exceptions here are noted of record.

The Public Utilities Commission of Ohio, E. J. Hople, Chairman, Charles F. Schaber, R. D. Williams, Commissioners. (Seal.)

Dated at Columbus, Ohio, this 29th day of May, 1935.

A true copy: C. H. Knisley, Secretary.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

**WAIVER OF PROCESS AND ENTRY OF APPEARANCES BY PUBLIC UTILITIES COMMISSION AND CITY OF PORTSMOUTH—Filed July 10, 1935**

The undersigned defendants in the above entitled action respectively waive the issuance of process and service herein upon them and hereby enter appearance.

Dated Wed., July 3, 1935.

The Public Utilities Commission of Ohio, by E. J. Hopple, Chairman. E. J. Hopple, Chairman, The Public Utilities Commission of Ohio. Charles F. Schaber, Member of The Public Utilities Commission of Ohio. Roy D. Williams, Member of The Public Utilities Commission of Ohio. John W. Bricker, Attorney General, State of Ohio. Donald C. Power, Special Counsel for The Public Utilities Commission of Ohio. The City of Portsmouth, by W. L. Dickey, Solicitor of Portsmouth, Ohio. Portsmouth Gas Company, by ———.

[fols. 37-38] IN UNITED STATES DISTRICT COURT

[Title omitted]

**WAIVER OF PROCESS AND ENTRY OF APPEARANCE BY PORTSMOUTH GAS CO.—Filed September 5, 1935**

The undersigned defendant, Portsmouth Gas Company, in the above entitled action waives the issuance of process and service herein upon it and hereby enters its appearance.

Portsmouth Gas Company, by (Sig.) John T. Beasley, Attorney.

Dated Wednesday, July 3, 1935, Terre Haute, Indiana.



[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANTS, THE PUBLIC UTILITIES COMMISSION OF OHIO, EDWARD J. HOPPLE, CHAIRMAN OF SAID COMMISSION; CHARLES F. SCHABER AND ROY D. WILLIAMS, MEMBERS OF SAID COMMISSION; JOHN W. BRICKER, ATTORNEY GENERAL OF THE STATE OF OHIO; DONALD C. POWER, SPECIAL COUNSEL FOR SAID THE PUBLIC UTILITIES COMMISSION OF OHIO—Filed July 30, 1935

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio:

Now comes The Public Utilities Commission of Ohio, Edward J. Hopple, chairman of said commission, Charles F. Schaber and Roy D. Williams, members of said commission, John W. Bricker, attorney general of Ohio and Donald C. Power, special counsel for said The Public Utilities Commission of Ohio and file their answer in the above styled and numbered cause, and for their answer to so much of the bill in the above entitled cause, as these defendants are advised it is necessary for them to make answer unto, say:

1. These answering defendants admit the allegations of [fol. 40] fact stated in paragraph 1 of the bill of complaint.

2. These answering defendants admit the allegations of fact stated in paragraph 2 of the bill of complaint, except that these defendants deny the allegation that the gas produced by United Fuel Gas Company is transported and delivered to the Portsmouth Gas Company without co-mingling the same with any gas produced or purchased in Ohio, and without reducing the pressure at which the same is so transported prior to such delivery, and that said sale and delivery of gas is interstate commerce. These answering defendants further deny that the attempt of the defendant, The Public Utilities Commission of Ohio, to prescribe the price at which United Fuel Gas Company shall sell its gas to the defendant, Portsmouth Gas Company, is an attempt upon the part of said Commission to regulate the United Fuel Gas Company's business in interstate commerce in violation of that part of Section 8 of

Article 1 of the Constitution of the United States, delegating to the Congress of the United States the exclusive power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

Defendants aver that United Fuel Gas Company, out of the same pipe line which is used to transport its gas to the Portsmouth Gas Company, delivers certain other gas from the same sources to a distribution system supplying the town of New Boston in the state of Ohio and the city of Ironton in the state of Ohio, and that the distribution of natural gas in said town of New Boston, and the said city of Ironton, is made to the inhabitants of the said municipalities by United Fuel Gas Company through a distribution system owned by United Fuel Gas Company.

3. These answering defendants admit the allegations of fact stated in paragraph 3 of the bill of complaint.

4. These answering defendants admit the allegations of fact stated in paragraph 4 of the bill of complaint.

5. These answering defendants admit the allegations of fact stated in paragraph 5 of the bill of complaint.

6. These answering defendants admit the allegations of fact stated in paragraph 6 of the bill of complaint, except that these defendants deny that gas produced by United Fuel Gas Company and transported by the same pipe line that is used to transport gas to the Portsmouth Gas Company, is distributed by United Fuel Gas Company to its customers in other Ohio towns without disturbing or interrupting the continuous flow of gas in said pipe line, either by reducing the pressure therein or in any other manner; these defendants further deny that the transaction covering the sale of gas from the United Fuel Gas Company to the Portsmouth Gas Company is interstate commerce; these defendants deny that the power and jurisdiction assumed by The Public Utilities Commission of Ohio to regulate the price at which United Fuel Gas Company shall sell its gas to the Portsmouth Gas Company is a regulation of interstate commerce, and deny that it is in violation of that part of Section 8 of Article 1 of the Constitution [fol. 41] of the United States, conferring upon the Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

These defendants further deny that the orders of The Public Utilities Commission of Ohio referred to in the bill of complaint filed herein, and the statute law of the state of Ohio upon which the same are based, are null and void or in violation of that part of Section 10 of Article 1 of the Constitution of the United States which prohibits any state from passing any law impairing the obligation of contracts, or that the effect of said statute of the state of Ohio as construed by the Public Utilities Commission of Ohio in said orders impairs or abrogates any lawful contract existing between United Fuel Gas Company and the Portsmouth Gas Company.

Defendants further deny that the interests of United Fuel Gas Company in said contract with Portsmouth Gas Company is a property right, or that it constitutes property of United Fuel Gas Company, or that the action of the defendant, The Public Utilities Commission of Ohio abrogates or destroys any property right belonging to United Fuel Gas Company, or that it deprives United Fuel Gas Company of any valuable property without due process of law, or that it denies to United Fuel Gas Company the equal protection of the laws or that it is in violation of Section 1 of the Fourteenth Article of Amendment of the Constitution of the United States. These defendants further deny that a compliance with the orders of The Public Utilities Commission of Ohio would entail upon United Fuel Gas Company, the expenditure of a very large sum of money or that such expense would aggregate more than one hundred thousand dollars (\$100,000.00).

These answering defendants further deny the allegations contained in said paragraph 6 of the bill of complaint to the effect that the Public Utilities Commission of Ohio is without any jurisdiction to make the orders complained of or that the statutes under which it is acting violates the commerce clause of the Constitution of the United States, or that the expenditure of any large sum of money would be occasioned thereby. These defendants further deny that United Fuel Gas Company will be irremediably injured and damaged by the carrying out of the orders of The Public Utilities Commission of Ohio complained of, or that United Fuel Gas Company will be damaged to any extent whatever by carrying out said orders.

7. Defendants deny each and every allegation of fact stated in paragraph 7 of the bill of complaint.

Further answering defendants deny each and every allegation of fact stated in the bill of complaint, except insofar as the same are herein expressly admitted.

[fol. 42] Wherefore having fully answered the bill of complaint, these answering defendants pray that the temporary restraining order granted herein on the third day of July, 1935, be vacated, and that the application for an interlocutory injunction be denied, and that upon final consideration, the bill of complaint be dismissed at plaintiff's costs and that these defendants may go hence without day, and for judgment for their costs.

The Public Utilities Commission of Ohio, Edward J. Hopple, Chairman of Said Commission; Charles F. Schaber and Roy D. Williams, Members of Said Commission; John W. Bricker, Attorney General of Ohio; Donald C. Power, Special Counsel for Said The Public Utilities Commission of Ohio, by John W. Bricker, Attorney General of Ohio, Donald C. Power, Attorney for The Public Utilities Commission of Ohio, Solicitors for These Answering Defendants.

*Duly sworn to by E. J. Hopple. Jurat omitted in printing.*

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO CERTAIN FACTS—Filed September 23, 1935

It is stipulated by the parties hereto that the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, a copy of which is filed as Exhibit G with the bill, are the facts in regard to the natural gas and its movement pertinent to the consideration of the question involved in this case and the said findings of fact by the said The Public Utilities Commission may be treated by the Court as admissions of the parties in regard thereto; and it is further stipulated that it will cost the plaintiff a substantial sum of money, in excess of three thousand dollars to comply with the commission's order complained of.

United Fuel Gas Company, by H. A. Ritz, Counsel.  
The Public Utilities Commission of Ohio, Edward

J. Hopple, Chairman of said Commission, Charles F. Schaber and Roy D. Williams, members thereof; John W. Bricker, Attorney General of the State of Ohio, and Donald C. Power, Special Counsel of said The Public Utilities Commission of Ohio, by Donald C. Power, Their Attorney. The City of Portsmouth, a municipal corporation, by W. L. Dickey, Its Attorney. The Portsmouth Gas Company, by John T. Beasley, Its Attorney.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED BILL OF COMPLAINT—Filed November 20, 1936

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio:

United Fuel Gas Company, a corporation, tenders this, its amended bill of complaint, against The Public Utilities Commission of Ohio, Edward J. Hopple, Chairman of said Commission, Charles F. Schaber and Roy D. Williams, members of said Commission, John W. Bricker, Attorney General of the State of Ohio, Donald C. Power, Special Counsel for said The Public Utilities Commission of Ohio, The City of Portsmouth, a municipal corporation, and Portsmouth Gas Company, a corporation, defendants, and respectfully shows:

## I

That it has heretofore filed its original bill in this cause, to which it now refers, and asks that all of the allegations, together with the exhibits attached to said original bill, be now considered a part of this, its amended bill.

## II

That, as will appear from said original bill, this suit is brought for the purpose of enjoining the enforcement of an order entered by the defendant The Public Utilities Commission of Ohio requiring the plaintiff to show what would be a fair price for it to charge for natural gas furnished by it to the defendant Portsmouth Gas Company, under a con-



tract in existence at the time of the filing of said original bill and at the time of the entry of said order, which is filed as Exhibit "A" with the original bill in this cause; that [fol. 45] since the filing of said original bill, as will appear from an examination of said contract, the same has expired by its own terms—that is to say, on the 1st day of November 1936, while the order of the Public Utilities Commission of Ohio, complained of, asserts the power to require the plaintiff to furnish gas to the defendant Portsmouth Gas Company at such rates as may be prescribed by the defendant The Public Utilities Commission of Ohio, regardless of the contract relations existing between the said plaintiff and the said defendant Portsmouth Gas Company, and the said order, if valid, requires plaintiff to continue furnishing such natural gas at rates to be prescribed by said Commission, regardless of any agreements or arrangements between the said Portsmouth Gas Company and the said plaintiff.

Plaintiff avers, however, that negotiations have been pending between it and the said Portsmouth Gas Company, looking to making a new contract for the supply of natural gas upon the expiration of said old contract; that such negotiations have not been completed, but that, pending the same, the said plaintiff, by its General Counsel, on October 23, 1936, wrote to the President of the Portsmouth Gas Company a letter in words and figures following:

October 23, 1936.

"Mr. Homer V. Armstrong, President  
The Portsmouth Gas Company  
623 Cherry Street  
Terre Haute, Indiana

MY DEAR MR. ARMSTRONG:

In view of the fact that we have not yet succeeded in negotiating a new contract for the supply of natural gas to your Company at Portsmouth after the expiration of the present contract on November 1st, I suggest that we agree that the present contract continue in effect in all its terms for one year from present date of expiration, in order to give us time to conclude the negotiations. If this is satisfactory to you, I will treat your communication in reply to this, expressing that assent, as an extension of the contract.

Yours very truly, (Signed) Harold A. Ritz."

That on October 27, 1936, the President of the said Portsmouth Gas Company replied thereto in words and figures following:

[fol. 46]

October 27, 1936.

"Mr. Harold A. Ritz, General Counsel, United Fuel Gas Company, Charleston, West Virginia.

MY DEAR MR. RITZ:

I have your letter of the 23rd instant calling attention to the fact that the gas supply contract for the Portsmouth Gas Company expires on November 1st, and suggesting that the present contract continue in effect in all of its terms for a period of one year from the present date of expiration.

Considering that our negotiations with your company for a new contract have not been concluded yet, we will agree that the present contract in its entirety be extended for one year from November 1st of this year.

Yours very truly, (Signed) H. V. Armstrong, President.

That by virute of such exchange of letters, the said contract, Exhibit "A" with the bill herein, is still in full force and effect.

Plaintiff reiterates the prayer of the original bill, and prays for all such other, further and general relief as to equity may seem just.

United Fuel Gas Company, by H. A. Wallace, President.

Freeman T. Eagleson, Harold A. Ritz, Attorneys.

*Duly sworn to by H. W. Wallace. Jurat omitted in printing.*

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

SECOND AMENDED BILL OF COMPLAINT AND WAIVER OF  
SUMMONS—Filed May 8, 1939

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio:

United Fuel Gas Company, a corporation, tenders this its second amended bill of complaint against the Public Utilities

Commission of Ohio; George McConnaughey, Chairman of said Commission, Roy D. Williams and Dennis F. Dunlavy, members of said Commission; Thomas Herbert, Attorney General of the State of Ohio, Kenneth L. Sater, Special Counsel for said The Public Utilities Commission, The City of Portsmouth, a municipal corporation, and the Portsmouth Gas Company, a corporation, Defendants, and respectfully shows:

## I

That it has heretofore filed its original bill in this cause, as well as its amended bill herein, to which original and amended bills it now refers and asks that all of the allegations thereof, together with the exhibits attached thereto, be now considered a part of this amended bill.

[fol. 48]

## II

That, as will appear from said original bill, this suit is brought for the purpose of enjoining the enforcement of an order entered by the defendant The Public Utilities Commission of Ohio requiring the plaintiff to show what would be a fair price for it to charge for natural gas furnished by it to the defendant Portsmouth Gas Company, under a contract in existence at the time of the filing of said original bill and at the time of the entry of said order, which is filed as Exhibit "A" with the original bill in this cause, that the said contract, by its own terms, expired on the 1st day of November, 1936; that it appears from said amended bill that before the expiration of the term of said contract the parties extended the expiration date thereof for one year from the 1st day of November, 1936—that is to say, until the 1st day of November, 1937.

Complainant now avers that before the date of the expiration of said extended term, to-wit, on the 15th day of October, 1937, it and the said Portsmouth Gas Company agreed to an extension thereof for an additional year, until the 1st day of November, 1938, said agreement being consummated by a letter written by complainant's General Counsel to Homer V. Armstrong, President of said Portsmouth Gas Company, dated October 15, 1937, in the following words and figures, to-wit:

“Charleston, W. Va., October 15, 1937.

Mr. Homer V. Armstrong, President, Portsmouth Gas Company, 632 Cherry Street, Terre Haute, Indiana.

DEAR SIR:

The contract for supplying you with natural Gas at Portsmouth, Ohio, as the same was extended by our exchange of letters last October, will expire again on November 1st.

[fol. 49] I wonder if it would not be well to extend the contract for another year from November 1st or until such time as we conclude a new contract.

If you agree with this and will so write me, we will consider that as evidence of the contract.

Very truly yours, (Signed) Harold A. Ritz”.

And by an acceptance of said extension of said agreement by a letter from said Portsmouth Gas Company, by H. V. Armstrong, its President, dated October 27, 1937, in the following words and figures, to-wit:

“Terre Haute, Indiana, October 27, 1937.

Mr. Harold A. Ritz, United Fuel Gas Company, Charleston, W. Va.

DEAR SIR:

I have your letter of the 15th advising me that the one year extension to the gas purchase contract expires again on November 1st.

Considering that we haven't been able to conclude a new contract, we will agree with you to extend the expired contract in all of its terms for another year from November 1st, or until we can conclude a new contract.

Yours very truly, Portsmouth Gas Company,  
(Signed) H. V. Armstrong, President.”

That before the expiration of the time to which said contract was extended by the letters aforesaid, to-wit, on the 8th day of October, 1938, complainant's General Counsel wrote a letter to said Portsmouth Gas Company, by Homer V. Armstrong, its President, suggesting the extension of said contract for another year, to-wit, until the 1st day of November, 1939, which letter is in the words and figures following, to-wit:

[fol. 50]

"Charleston, W. Va., October 8, 1938.

Mr. Homer V. Armstrong, President, Portsmouth Gas Company, 632 Cherry Street, Terre Haute, Ind.

MY DEAR MR. ARMSTRONG:

As you know, the contract for supplying your Company with natural gas at Portsmouth, Ohio, as the same was extended by our exchange of letters last October, will expire again on November 1st of this year. I suggest that it would be well to extend this contract for another year from November 1, 1938, or until such time as we conclude a new contract.

If you agree with this suggestion and will so write me, we will consider this letter and your reply thereto as evidence of the contract.

Yours very truly, (Signed) Harold A. Ritz."

And that the said Portsmouth Gas Company, by its said President, H. V. Armstrong, agreed to said extension and the same became binding, by a letter dated October 26, 1938, in the words and figures following, to-wit:

"Terre Haute, Indiana, October 26, 1938.

Mr. Harold A. Ritz, United Fuel Gas Company, Charleston, W. Va.

DEAR SIR:

I have your letter of the 8th advising me that the one year extension to the gas purchase contract expires again on November 1st.

Considering that we haven't been able to conclude a new contract, we will agree with you to extend the expired contract in all of its terms for another year from November 1st, or until we can conclude a new contract.

Yours very truly, Portsmouth Gas Company,  
(Signed) H. V. Armstrong, President."

So that complainant says that said contract is now in full force and effect in all of its terms.

[fol. 51]

III

That since the institution of this suit, to-wit, on the 21st day of June, 1938, the Congress of the United States passed an act to control and regulate the business of natural gas



in interstate commerce, known as the "Natural Gas Act", Title 15, USCA, Section 717, etc. By the terms of this act the exclusive power to regulate the business of natural gas in interstate commerce is conferred upon the Federal Power Commission, and if the Public Utilities Commission of Ohio ever had any jurisdiction to regulate the delivery of natural gas by this plaintiff to the said Portsmouth Gas Company, it was deprived of the same by the passage of said "Natural Gas Act."

#### IV

That since the institution of this suit, Edward J. Hopple, who is named therein as Chairman of the said Public Utilities Commission of Ohio, has ceased to be a member of said Commission, and the defendant George McConnaughey is the successor of the said Edward J. Hopple; that Charles F. Schaber, who is named as one of the Commissioners in said original bill, has ceased to be a member of said Commission, and that the said Dennis F. Dunlavy is now a member of said Commission; that the said John W. Bricker, Attorney General of the State of Ohio, has ceased to be Attorney General of said State, and the said Thomas Herbert is now the duly elected and qualified Attorney General of said State of Ohio; that the said Donald C. Power, named as Special Counsel for said Public Utilities Commission of Ohio in said original bill, has ceased to hold said office, and the said office is now held and being administered by the Defendant Kenneth L. Sater; and that the said George McConnaughey, Dennis F. Dunlavy, Thomas Herbert and Kenneth L. Sater should be substituted as defendants herein in place of the said Edward J. Hopple, Charles F. Schaber, John W. Bricker and Donald C. Power, respectively. [fol. 52]

Plaintiff reiterates the prayer of its original bill, and prays for all such other, further and general relief as to equity may seem just.

United Fuel Gas Company, by H. A. Wallace, President.

Eagleson & Laylin, Harold Ritz, Attorneys.

*Duly sworn to by H. A. Wallace. Jurat omitted in printing.*

March 19, 1939.

All defendants herein, except Portsmouth Gas Company enter their appearance hereto and waive service of summons hereon.

(Sig.) Kenneth L. Sater, Special Counsel.

Portsmouth Gas Company, by John H. Beasley, Atty.

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted].

SUPPLEMENTAL ANSWER OF PUBLIC UTILITIES COMMISSION TO  
AMENDED AND SECOND AMENDED BILLS OF COMPLAINT—  
Filed April 25, 1939

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio:

For their supplemental answer to the amended and second amended bills of complaint of The United Fuel Gas Company, defendants, The Public Utilities Commission of Ohio; George McConaughy, Chairman of said Commission; Roy D. Williams and Dennis F. Dunlavy, Members of said Commission; Thomas Herbert, Attorney General of the State of Ohio; Kenneth L. Sater, Special Counsel for said The Public Utilities Commission of Ohio and the City of Portsmouth, a municipal corporation, admit that plaintiff has heretofore filed its original bill herein and that its said amended bill and second amended bill are supplemental hereto.

Further answering defendants admit all of the allegations of Par. II in said amended bill and said second amended bill, except the following allegation in Par. II of said amended bill:

"While the order of The Public Utilities Commission of Ohio, complained of, accepts the power to require the plaintiff to furnish gas to the defendant Portsmouth Gas Company at such rates as may be prescribed by the defendant The Public Utilities Commission of Ohio, regardless of the contract relations existing between the said plaintiff and the said defendant Portsmouth Gas Company, and the said order, if valid, requires plaintiff to continue furnishing such

natural gas at rates to be prescribed by said Commission, regardless of any agreements or arrangements between the said Portsmouth Gas Company and the said plaintiff."

[fol. 54] Further answering defendants admit the allegations contained in Sentence 1 of Par. III of second amended bill and all of the allegations contained in Par. IV of said second amended bill.

Further answering defendants deny each and every material allegation in said amended bill and said second amended bill not herein expressly admitted to be true.

Wherefore, defendants renew the prayer of their original answer and pray for all such other and further relief as may be necessary or proper in the premises.

The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission; Roy D. Williams and Dennis F. Dunlavy, members of said Commission; Thomas Herbert, Attorney General of the State of Ohio; Kenneth L. Sater, Special Counsel for the Public Utilities Commission of Ohio and The City of Portsmouth, a municipal corporation. Thomas J. Herbert, Attorney General of Ohio; Kenneth L. Sater, Attorney for The Public Utilities Commission of Ohio, Solicitors for These Answering Defendants. W. L. Dickey, by K. L. S., Attorney for the City of Portsmouth, a municipal corporation.

*Duly sworn to by George McConnaughey. Jurat omitted in printing.*

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

THIRD AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT—  
Filed April 8, 1941

To the Honorable Judges of the District Court of the  
United States for the Southern District of Ohio:

United Fuel Gas Company, a corporation, tenders this its third amended and supplemental bill of complaint against The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commis-

sion, Thomas Herbert, Attorney General of the State of Ohio, Kenneth L. Sater, Special Counsel for said Public Utilities Commission, the City of Portsmouth, a municipal corporation, and the Portsmouth Gas Company, a corporation, defendants, and respectfully shows:

## I

That it has heretofore filed its original bill in this cause, as well as its first and second amended and supplemental bills herein, to which original and first and second amended bills it now refers and asks that all of the allegations thereof, together with the exhibits attached thereto, be now [fol. 56] considered as part of this amended bill.

## II

That as will appear from said original bill, this suit was brought for the purpose of enjoining the enforcement of an order of the Public Utilities Commission of Ohio requiring the plaintiff to show what would be a fair price for it to charge for natural gas furnished by it to the defendant Portsmouth Gas Company under a contract in existence at the time of the filing of said original bill and at the time of the entry of said order, and to charge such rate as may be prescribed by said Public Utilities Commission, which order is filed as Exhibit "E" with said original bill in this cause.

That said contract, by its own terms, expired on the 1st day of November, 1936; that it appears from the first amended bill that before the expiration of said contract, the parties extended the expiration date thereof for one year from the 1st day of November, 1936—that is to say, until the 1st day of November, 1937; that before the expiration of said one year, the parties again, as appears from said second amended bill, extended the contract for an additional year—that is, until the 1st day of November, 1938; and that before the expiration of said additional year, the said parties, as appears from said second amended bill, again extended the contract for an additional year, or until such time as the parties should negotiate a new contract upon different terms. All of which appears from the said second amended bill.

That the parties have not negotiated any new contract, but have continued their contractual relations with each

other upon the same terms and conditions as provided by said last extension.

[fol. 57]

### III

That since the filing of said second amended and supplemental bill, Roy D. Williams, who is named therein as a member of the Public Utilities Commission of Ohio, has ceased to be a member of said Commission, and that the defendant Harry M. Miller is the successor of the said Roy D. Williams, and the said Harry M. Miller should be substituted as a defendant herein in place of the said Roy D. Williams.

### IV

That on the 21st day of June, 1938, the Congress of the United States passed what is known as the "Natural Gas Act"; that by the terms of said act the transaction between this plaintiff and the defendant Portsmouth Gas Company falls within the jurisdiction of the Federal Power Commission under the said "Natural Gas Act"; that said "Natural Gas Act" is contained in U. S. C. A., Title 15, Chapter 15B; that under the provisions of Section 717c, clause (c) of said section, every natural gas company shall file with the Commission schedules showing rates and charges for transportation for sale natural gas subject to the jurisdiction of the Commission; and in paragraph (d) of said section it is provided that no change shall be made by any natural gas company of any such rate or regulation or contract relating thereto, except after thirty days' notice to the Commission and the public; and by paragraph (b) of Section 717f of said act, it is provided that no natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission, first had and obtained, after a due hearing and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted or that the present or future public convenience or necessity permits such abandonment.

### V

That in accordance with the requirements of said "Natural Gas Act", this plaintiff filed with said Federal Power



Commission its contract with the said Portsmouth Gas Company as its schedule of rates and charges for the service performed thereunder; that said contract was received by said Commission and filed as such schedule of rates; that, as the same was extended from time to time, as shown by the said second amended bill herein, such extensions were filed with said Commission and approved thereby, the last extension being the one referred to in said second amended bill as created by the letter of October 8, 1938, from Harold A. Ritz to Homer V. Armstrong, and the acceptance of the same by letter from H. V. Armstrong to Harold A. Ritz, which was duly approved by said Federal Power Commission by an order entered by that Commission on the 14th day of February, 1939, to be effective November 1, 1938. An office copy of said order is filed herewith as part hereof, marked Exhibit No. 1.

Plaintiff says that under the "Natural Gas Act" above referred to, the Federal Power Commission has exclusive jurisdiction of the subject-matter of this suit; that it has taken such jurisdiction and is now and has at all times since the enactment of said law, been exercising its jurisdiction and power over the said transaction. That under said "Natural Gas Act" it would be unlawful for this plaintiff to charge any other rate than that on file with said Federal Power Commission, and it would be unlawful for the Public Utilities Commission of Ohio to fix any rate [fol. 59] whatever for the service rendered by this plaintiff to the said Portsmouth Gas Company, that being a matter within the exclusive jurisdiction of the said Federal Power Commission:

This plaintiff reiterates the prayer of its original and first and second amended bills herein, and prays that the said Public Utilities Commission of Ohio be enjoined, inhibited and restrained from attempting in any way to fix a rate for the sale of natural gas by this plaintiff to the said Portsmouth Gas Company.

United Fuel Gas Company, by W. J. Hightower,  
Treasurer. Eagleam & Laylin, Harold Ritz, Counsel.

*Duly sworn to by W. J. Hightower. Jurat omitted in printing.*

[fol. 60] EXHIBIT NO. 1 TO THIRD AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT

UNITED STATES OF AMERICA

Federal Power Commission

Claude L. Draper, Acting Chairman; Basil Manly, Commissioners:

John W. Scott. Clyde L. Seavey, not participating.

February 14, 1939.

In the Matter of UNITED FUEL GAS COMPANY

ORDER ALLOWING RATE SCHEDULE TO TAKE EFFECT PRIOR TO DATE OF FILING

It appearing to the Commission that:

(a) On November 2, 1938, the United Fuel Gas Company filed with the Federal Power Commission its supplemental agreement, dated October 26, 1938, to its agreement of October 22, 1931, with the Portsmouth Gas Company, providing for the sale of natural gas by the United Fuel Gas Company to the Portsmouth Gas Company for resale in Portsmouth, Ohio;

(b) By the terms of said supplement it is to become effective November 1, 1938, and is to continue the terms of said agreement of October 22, 1931, in effect without modification or change for a period of one year from November 1, 1938, or until such time as a new agreement between these two parties can be executed;

(c) Good cause has been shown for, and the public interest will be served by, permitting said supplement to take effect as of November 1, 1938;

The Commission orders that:

The supplement, dated October 26, 1938, between the United Fuel Gas Company and the Portsmouth Gas Company, as filed with the Federal Power Commission on November 2, 1938, be and the same is hereby allowed to take effect as of November 1, 1938.

By the Commission.

/s/ Leon M. Fuquay, Secretary.

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

**MOTION OF PUBLIC UTILITIES COMMISSION TO DISMISS AND  
SUPPORTING MEMORANDUM—Filed April 24, 1941**

Now come Defendants, Public Utilities Commission of Ohio, George C. McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members, Thomas J. Herbert, Attorney General of the State of Ohio and Kenneth L. Sater, Special Counsel for said Commission, and move to dismiss the original and three amended and supplemental bills of complaint filed herein for the reasons and upon the grounds that:

1. Said bills of complaint do not state facts sufficient to warrant this Court in granting plaintiff any relief;
2. Plaintiff has a plain, adequate and complete remedy at law; and,
3. This Court has no jurisdiction over the persons of these moving defendants or any of them or over the subject matter of this action.

This motion is made separately and severally as to each stated reason and ground.

Thomas J. Herbert, Attorney General of the State of Ohio. Kenneth L. Sater, Attorney for the Public Utilities Commission of Ohio.

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[fol. 62] MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Plaintiff's third amended and supplemental bill filed herein alleges for the first time the enactment and provisions of the Federal statute familiarly known as the Natural Gas Act. The only inference to be derived from such course of pleading is that that Act has a material bearing on the case at bar (probably an asserted termination of the jurisdiction of defendant Commission in the premises) because otherwise there would be no good purpose served by pleading the Act and plaintiff's asserted compliance therewith. Consequently, and as a result of these allegations, it is necessary and proper for these moving defendants, in maintaining their rights, to present this

motion at this time without answering over to such bill. Generally, it is the purpose of this motion to show to the Court that the questions and matters in issue herein are purely and basically jurisdictional. Specifically, it is the purpose of this motion to show in connection therewith three matters as follows:

1. Plaintiff's bills of complaint state insufficient facts to constitute a cause of action because the provisions of the Natural Gas Act do not apply to an alleged cause of action arising some six or seven years prior to its enactment and effective date and because the trial brief heretofore prepared and filed herein in 1935, on behalf of these moving defendants amply shows full jurisdiction and authority in defendant Commission not only to make the orders in question but also to make a final order thereafter.

2. Although plaintiff's bill was filed so prematurely that it is not entitled at this time to any relief either in this Court or in any court of the state of Ohio, it will at the proper time and in due course, be able to utilize a plain, adequate and complete remedy either at law or in equity in the courts of the state of Ohio upon proper showing made. Until that time arrives, it must comply with the orders of defendant Commission.

3. Even if at this time plaintiff's bill could state sufficient facts to constitute a cause of action, its relief would be through the courts of the state of Ohio and not through [fol. 63] this Court which even in that event is barred by the Federal Johnson Act from assuming jurisdiction, which lack of jurisdiction, this Court is bound sua sponte to recognize.

A motion to dismiss searches the record to date particularly with regard to pleadings filed by the opponent. From plaintiff's original bill, the following key facts are taken:

Defendant Portsmouth Gas Company distributes and sells gas at retail in the City of Portsmouth, Ohio. Its supply at all times mentioned herein has been purchased wholesale from plaintiff. On October 22, 1931 plaintiff entered into a contract with such defendant company to sell gas to it for a period of five years at the price of 37¢ per M c.f. By its terms, this contract would have expired on October 21, 1936. On February 24, 1932, just four months after the date of such contract, defendant City of Portsmouth

enacted an ordinance establishing the retail rate for the sale of gas within such city at 45¢ per M c.f. where the rate had theretofore been 65¢. Promptly, thereafter, defendant Portsmouth Gas Company declined to accept such new rate and appealed from the enactment of such ordinance to defendant Commission which assumed jurisdiction, set bond under which said defendant Company might collect the retail rate last in effect and commenced its usual hearings on such appeal, all as provided by the law of Ohio. On June 18, 1934 defendant Commission made plaintiff a party to the proceeding before it and ordered it to present a copy of its contract with defendant Portsmouth Gas Company. Plaintiff complied with this order. On April 18, 1935 defendant Commission handed down a further order directing plaintiff to submit all pertinent and relevant testimony and evidence tending to prove a just and reasonable rate to be charged by it for its wholesale sale of gas to defendant company; this order was based on findings by defendant Commission that the new ordinance rate was unjust, unreasonable and insufficient to yield a reasonable compensation and that it should substitute therefore a just and reasonable rate but could not do so in the absence of proof [fol. 64] of a just and reasonable rate for plaintiff's sales of gas wholesale to defendant Portsmouth Gas Company. This order was affirmed by defendant Commission on May 29, 1935 and five weeks later, July 3, 1935, this proceeding was instituted by plaintiff. The two orders of defendant Commission appear as Exhibits "E" and "G" to plaintiff's bill. In July, 1935 these defendants filed their answer and on October 21, 1936, as mentioned; plaintiff's contract with defendant Portsmouth Gas Company was due to expire.

From plaintiff's first and second amended and supplemental bills, it is seen that plaintiff and defendant Portsmouth Gas Company "extended" their wholesale contract successively to November 1, 1937 and to November 1, 1938.

From plaintiff's third amended and supplemental bill, it is seen that the contract hereinabove referred to between the plaintiff and defendant Portsmouth Gas Company was again "extended" to November 1, 1939 or until a new contract should be made. It further appears that the Federal Natural Gas Act was duly enacted on June 21, 1938 and that by November 2, 1938 plaintiff had filed with the Federal Power Commission its original contract with defend-



ant Portsmouth Gas Company and the last extension thereto, all in accordance with the requirements of such Natural Gas Act.

# I

Plaintiff's bills do not state facts sufficient to warrant this court in granting it any relief.

It should be noted from the foregoing narration of events in their chronological order that the Natural Gas Act was enacted and became effective seven years after plaintiff's contract with defendant Portsmouth Gas Company, two years after the original date of termination of such contract, six and one-half years after the rate ordinance in question was enacted and appealed from, six and one-half years after defendant Commission assumed jurisdiction under the law of Ohio and three and one-half years after this case was filed in this Court.

[fol. 65] Paragraph (c) of Rule 15 of the Federal Rules of Civil Procedure. (U. S. C. A., Title 28, Foll. Sec. 723 (c)) permits certain amendments to relate back to the date of the original pleading. Clearly, however, this cannot be done in the case at bar and plaintiff's three amended and supplemental bills do not fall within the purview of that Rule because in no event can the Natural Gas Act be related back six and one-half years beyond its effective date (U. S. C. A., Title 28, Sec. 747b, 52 Stat. 822, c. 556, Sec. 3) or six years beyond the date of its enactment to the time of the appeal by defendant Portsmouth Gas Company to defendant Commission. There is and can be in none of plaintiff's pleadings, any allegations that the ordinance appealed from to defendant Commission covered a period of time sufficiently long to bring even a part of it within the effective period of the Natural Gas Act, or that the two orders of defendant Commission, of which plaintiff complains, would or did relate to a period of time covered by the Natural Gas Act. It is legally and factually obvious that in none of the proceedings before it, did defendant Commission act with regard to, or as of, any period of time subsequent to June 21, 1938:

To the contrary, the law of Ohio (Sec. 614-44, Ohio General Code) requires defendant Commission to pass on an ordinance with regard to the time during which it is effective (in this instance a two year period beginning February 24, 1932) and under certain conditions to set a substi-

tute rate commencing as of the date of the original enactment of the ordinance under consideration (Sec. 614-46, Ohio General Code). This is because the action of defendant Commission would be a substitute for the ordinance and any action which defendant Commission may ultimately take will consequently be as of February 24, 1932, the "date certain" of the Ohio law (Sec. 499-9, Ohio General Code).

It is obvious that the Natural Gas Act cannot be related back to that date. Thus, the three amended and supplemental bills do not either separately or jointly state facts sufficient to warrant this Court in granting plaintiff any relief and unless the original bill contains a sufficiency of such facts, this suit must be dismissed.

[fol. 66]. Furthermore, no plaintiff may institute litigation on the broad basis of interference with interstate commerce as of the early part of 1932 and at the very end of the litigation in 1941 change that basis to a much narrower and specific ground which did not exist at the start and which cannot be related back six and one-half years to that time.

Section (d) of the same Rule of Civil Procedure allows parties to set up events which have happened "since the date of the pleading sought to be supplemented." In view of the foregoing discussion, it is equally obvious that plaintiff cannot by amendment, make its original bill speak as of any other date than that on which it was filed without so removing its cause of action chronologically from the proceeding before and action by defendant Commission that it would patently be impossible to state a cause of action.

The Natural Gas Act clearly has no place in this litigation and no form of pleading can bring it in. The issues were made when the bill was filed and the matter of interstate commerce was amply briefed to this Court at that time. Consequently, plaintiff's bill takes no strength from the three amendments to it and since it does not state sufficient facts, it must also be dismissed; it is now no stronger than it was on July 3, 1935 when it was filed.

## II

Plaintiff has a plain, adequate and complete remedy at law.

The question then arises whether plaintiff is entitled to relief in view of the allegations contained in its original bill. The answer must be in the negative whether plaintiff's bill is considered by itself or in connection with any

or all of the supplemental bills. Section 544, Ohio General Code, states that a final order made by the Commission shall be reversed, vacated or modified by the supreme court on appeal if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable. [fol. 67] able. The commission referred to in that statute is defendant commission. On the equity side of the Ohio law, Sections 11876-11878, Ohio General Code, define injunctions and specify in detail, the jurisdiction to issue them. These four statutes furnish plaintiff with all the remedy necessary to protect its rights and there is no reason or cause for it to bring this or any other action in this Court. *Union Dry Goods Co. vs. Georgia Public Service Corp.*, 248 U. S., 372; 63 L. Ed., 309; 39 S. Ct., 117. These doctrines, principles and modes of redress are, of course, in full harmony with *Prentis vs. Atlantic Coast Line Co.*, 211 U. S. 210; 52 L. Ed., 150; 29 S. Ct., 67, the 3rd syllabus of which is:

"A Federal Circuit Court, on principles of comity should not entertain a suit by which injunctive relief is sought against railroad passenger rates as fixed by the Virginia State Corporation Commission in advance of the appeal to the highest state court from the order fixing the rates, which is given by the state constitution as of right to any aggrieved party".

These remedies via the courts of Ohio were held adequate in *East Ohio Gas Co. vs. Cleveland*, 94 Fed. (2d) 443, which case was preceded by the ruling of the Supreme Court of Ohio in *State Ex Rel. Cleveland vs. Court of Appeals*, 104 O. S., 96; 135 N. E. 377, holding that the creation of defendant Commission and the conferring of jurisdiction upon it in rate making matters did not withdraw from the Courts of Ohio any of the equitable jurisdiction which they had therefore had. Needless to say, these four sections of the Ohio Law antedated by many years the proceedings here under consideration.

It is moreover clear that plaintiff's assertion that it will have to spend a large sum of money in complying with the orders of defendant Commission furnish this Court with no ground for taking jurisdiction in view of *East Ohio Gas Co. vs. Federal Power Commission*, 115 Fed. (2d) 385, wherein review was denied even though the petitioner therein claimed that compliance with the the order of

the Federal Power Commission would cost it nearly twice as much as it is alleged to be involved here. This same [fol. 68] doctrine follows from *Canadian River Gas Co. vs. Federal Power Commission*, 110 Fed. (2d) 350 and all other similar cases wherein jurisdiction to regulate is unsuccessfully or prematurely attacked.

Since the date of the filing of defendant's trial brief herein, the law of both Ohio and of the United States with regard to orders of administrative bodies has been restated and classified. The Ohio Supreme Court had no occasion to define a "final order" as used in Section 544 of the Ohio Code, *supra*, until it received the case of *Dayton vs. Public Utilities Commission of Ohio*, 111 O. S., 476; 145 N. E., 849. In that case, Judge Matthiars held, (479-485) that such an order was one which effected a substantial right and ruled that an order overruling a motion for a rehearing was not a final order. Thereafter, the matter lay until *City of Cleveland vs. Public Utilities Commission of Ohio*, 136 O. S., 410; 26 N. E., (2d) 213, came before that Court. From a power rate ordinance enacted by the appellant City, the Cleveland Electric Illuminating Company appealed to defendant Commission and again, as in the case at bar, a bond was approved for the collection of the rate previously in effect. The City moved to dismiss the appeal on the grounds that the Commission was without jurisdiction to entertain the appeal or to suspend the ordinance rate. This motion was overruled and the City appealed to the Supreme Court of Ohio but on motion its appeal was denied on the ground and for the reason that no action thus far taken by the Commission in that proceeding constituted a final order from which an appeal could be taken. Clearly the orders from which relief is sought in the case at bar fall in the same category; they are not final orders.

A similar line of discussion has recently been considered and restated in the Federal Courts and the state rule relative to final orders has found its exact counterpart in the decisions in the Federal Courts. The entire matter of administrative orders was discussed by the Court in *Rochester Telephone Co. vs. United States of America*, 307 U. S., 125; 83 L. Ed., 1147; 59 S. Ct., 754. Therein the Court found [fol. 69] that previous court decisions involving the "negative order" principle fall into three classes (307 U. S. at



page 129; 83 L. Ed., at page 1152) and described the first class as follows:

"(1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission. Such a situation is presented by an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order."

This definition was followed by the United States Circuit Court of Appeals for the Sixth Circuit in *East Ohio Gas Co. vs. Federal Power Commission*, supra, in its holding that the order of respondent Federal Power Commission was an interim order not subject to judicial review. The third and fifth syllabi of that case state:

"An order of the Federal Power Commission which decreed that company which distributed natural gas to consumers was engaged in transportation of natural gas in interstate commerce and was therefore a natural gas company within meaning of Natural Gas Act, directed investigation into cost of transportation of natural gas to be undertaken, and directed the company to furnish certain data, was not reviewable by the Circuit Court of Appeals. Natural Gas Act §§ 1-24, and §§ 5(b), 19(a, b), 15 U. S. C. A. §§ 717-717w, and §§ 717d (b), 717r(a, b)."

"An order of the Federal Power Commission which declared that company which was engaged in distributing natural gas to consumers was a "natural gas company" within the meaning of Natural Gas Act, and directed investigation into cost of transportation of natural gas to be undertaken, and directed the company to furnish certain data, was not reviewable by Circuit Court of Appeals because of mere expectation that other orders of the Commission applicable to all natural gas companies might follow. Natural Gas Act §§ 1-24, and §§ 5(b), 19(a, b), 15 U. S. C. A. §§ 717-717w, and §§ 717d (b), 717r (a, b)."

Certainly there can be no closer parallel than that between these quotations and the case at bar. It is apparent beyond peradventure of doubt that the danger and loss which plaintiff anticipates flow not from the Commission's orders



of April 18, 1935 and May 29, 1935 here in issue but from [fol. 70] some future order which defendant commission has not yet made and which plaintiff can do no more than conjecture to be adverse when, as and if it is made. We respectfully submit, in view of the foregoing authorities, that plaintiff's basic fear is that defendant Commission will when this case is disposed of set aside plaintiff's contract rate with defendant Portsmouth Gas Company on some such ground as fraud, mismanagement or lack of discretion and establish for distribution rate purposes a lower allowance for wholesale purposes. The orders of defendant Commission are important only in that compliance therewith may bring out sufficient evidence to justify defendant Commission in making some such future order or finding, all as of February 24, 1932. However, at this time, plaintiff's pleadings are and cannot be other than silent on the questions whether any such orders of defendant Commission when made will be adverse to plaintiff, or will in any wise disturb its said contract rate of October 22, 1931.

Thus, by coordination and analysis of the statutes and authorities, we find that plaintiff has a plain, adequate and complete remedy both at law and in equity in the courts of the state of Ohio and may in due course take its choice of remedies on proper showing to the proper state court. That its purported financial loss and the lack of final order temporarily prevent it from seeking such remedies is no excuse especially when we consider that even if the orders complained of had been made by a Federal Commission, plaintiff could have obtained no relief or review. It is utterly unthinkable to assume that this Court whose jurisdiction is limited and which is presumed to be without jurisdiction unless it affirmatively appears (Simkins Federal Practice (Rev. Ed. 1923) 9, 298) should allow what powers it has to be used in a case where it would not have had jurisdiction if the cause had arisen in a Federal Commission and where by the rules of its immediate superior courts as well as the Supreme Court of Ohio, there is no cause of action in the state courts until some further change of position occurs in the future.

[fol. 71] The first two grounds of this motion have been considered and ruled on by the Supreme Court of Ohio in East Ohio Gas Co. vs. Public Utilities Commission of Ohio, 137 O. S., 225; 28 N. E. (2d) 599, where the Court said on pages 253-254:

"As to the first complaint, the commission had before it a rate ordinance of only two years' duration, expiring July 1, 1939, and had to move with celerity in the main objective of fixing the fair and reasonable rate which the consumers should pay for their gas as it came from the burner tips on their premisses. And in so doing it was the duty of the commission to fix a rate in Cleveland as of June 30, 1937. Any river rate the Federal Power Commission might designate would be of an entirely prospective nature and would consequently be of no benefit or controlling force in the present proceedings."

### III

#### **This Court Has No Jurisdiction Over the Persons of These Moving Defendants or Any of Them or Over the Subject Matter of This Action**

On May 14, 1934 the Congress of the United States enacted the Johnson Act, 28 U. S. C. A. Sec. 41(1), 48 Stat. 775, the material portion of which provides that:

"(1-3) No district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

This statute was followed by the United States Circuit Court of Appeals for the Sixth Circuit in *East Ohio Gas Co. vs. Cleveland*, supra. In that case, the District trial court was affirmed in declining to take jurisdiction in a [fol. 72] rate matter wherein the relief sought was basically the same as in the case at bar, namely, injunctive relief against a local regulatory body. On the basis of the statutes and authorities cited and discussed herein, we submit that the two cases cannot be distinguished since the case at bar

was instituted somewhat more than a year after the passage of the Johnson Act.

While it is true that this deficiency in the jurisdiction of this Court could have been attacked in limine, it is also true not only that parties to a cause cannot confer jurisdiction upon the Courts of the United States by consent where none would exist without it (7 Encyc. U. S. S. Ct. Reports 741 and cases there cited), but also that the Court will raise the question of its jurisdiction *sua sponte* (Simkins Federal Practice 286, 458). We respectfully submit that assumption of jurisdiction by this Court in the premises will be a disregard not only of the Johnson Act but also of the rule and principle of comity enunciated by the Supreme Court of the United States in *Prentis vs. Atlantic Coast Line Co.*, *supra*. This Act and this principle do not conflict with, but to the contrary reaffirm, the propriety and adequacy of state court remedies not only as such but also in the interest of jurisdictional harmony.

1. In conclusion, we respectfully submit that plaintiff's bills separately and severally state insufficient facts to constitute a cause of action because the provisions of the Natural Gas Act do not and cannot apply to an alleged cause of action arising six or seven years prior to its enactment and effective date, and because defendants' trial brief, already filed herein, amply shows defendant's Commission to hold full jurisdiction and authority to make not only the orders in question but also to make a final order thereafter.

2. Although plaintiff's bill was filed so prematurely that it is not entitled at this time to any relief in any court [fol. 73] either state or federal, it will at the proper time and in due course, be able to utilize a plain, adequate and complete remedy either at law or in equity in the courts of the state of Ohio upon proper showing; and in those courts it may have adjudicated whatever claims it may assert as to property rights or constitutional rights. But until that time arrives, it must comply with the orders of defendant Commission.

3. Even if it were possible at this time for plaintiff to state sufficient facts to constitute a *prima facie* cause of action, its relief would be through the courts of the state of Ohio and not through this Court which is barred by

the Johnson Act from assuming jurisdiction in the premises, a fact which it is bound to recognize.

We are authorized to say that the defendant City of Portsmouth concurs and joins in this motion and memorandum.

Respectfully submitted, Thomas J. Herbert, Attorney General of the State of Ohio. Kenneth L. Sater, Attorney for the Public Utilities Commission of Ohio.

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS—Filed July 8, 1941

This day this cause came on to be heard on the motion heretofore, to-wit: on April 24, 1941, filed on behalf of Defendants, Public Utilities Commission of Ohio, George C. McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members, Thomas J. Herbert, Attorney General of the State of Ohio and Kenneth L. Sater, Special Counsel for said Commission, to dismiss the original and three amended and supplemental bills of complaint filed herein for the reasons and upon the grounds set forth in the motion, and was submitted upon the briefs and arguments of counsel.

Upon consideration whereof, the court, being fully advised in the premises, finds said motion not well taken, and that it should be overruled.

It is, therefore, by the court ordered, adjudged and decreed that the motion to dismiss above referred to, be, and the same is, overruled. To all of which findings, rulings, orders and decrees of the court defendants; above named, hereby except.

(Sig.) Florence E. Allen, Judge, U. S. Circuit Court of Appeals; (Sig.) Robert R. Nevin, Judge, U. S. District Court; (Sig.) Mell G. Underwood, Judge, U. S. District Court.

[fol. 75] IN UNITED STATES DISTRICT COURT

[Title omitted]

**ANSWER OF PUBLIC UTILITIES COMMISSION TO THIRD AMENDED  
AND SUPPLEMENTAL BILL—Filed August 4, 1941**

**To the Honorable Judges of the District Court of the United  
States for the Southern District of Ohio:**

For answer to so much of the third amended and supplemental bill of complaint filed herein as they are advised it is necessary for them to make answer unto, defendants Public Utilities Commission of Ohio, George McConaughy, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commission, Thomas J. Herbert, Attorney General of the State of Ohio and Kenneth L. Sater, Special Counsel for said Public Utilities Commission of Ohio, say:

**I**

These answering defendants admit that plaintiff has heretofore filed its original bill in this cause as well as its first and second amended and supplemental bills and say further that in answer thereto they have heretofore filed herein their answer and supplemental answer, to which said answers they now refer and ask that all of the allegations thereof be considered as part of this answer to plaintiff's third amended and supplemental bill of complaint.

**II**

These answering defendants say that this suit was brought for the purposes of obtaining a decree to (1) declare null and void and of no effect the two orders of defendant Commission dated April 18, 1935, and May 29, 1935, requiring plaintiff to present all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio, and denying, for reasons there stated, plaintiff's application for a rehearing, copies of which said orders are attached to plaintiff's original bill and marked Exhibits "E" and "G" respectively; (2) enjoin, inhibit and restrain these answering defendants from enforcing said orders and from regulating



or attempting to regulate the transactions between plaintiff and defendant The Portsmouth Gas Company; and (3) enjoin, inhibit and restrain defendant City of Portsmouth from prosecuting any proceeding for the purpose of abrogating or destroying the validity of the contract between plaintiff and said The Portsmouth Gas Company.

These answering defendants say further that said orders were issued by defendant Commission in the hearing before it of the appeal by defendant Portsmouth Gas Company from the two-year gas distribution rate ordinance enacted by defendant City of Portsmouth on February 24, 1932, which said ordinance, appeal and order are alleged and referred to in Sections II and IV of plaintiff's original bill herein. Further answering, these defendants say that when defendant Portsmouth Gas Company appealed to defendant Commission in February, 1932, as set forth in plaintiff's original bill, it gave a bond prescribed by defendant Commission and ever since then has been collecting for the retail distribution of gas in the defendant City of Portsmouth, the rate which was in effect in said defendant City prior to the passage of the said rate ordinance dated February 24, 1932. These defendants say that said ordinance, appeal, bond and order were each duly enacted and performed under the laws of the State of Ohio then and now in full force and effect. They further say that by reason of the temporary restraining order granted herein, hearings on said appeal of The Portsmouth Gas Company before defendant Commission have been restrained and suspended since July, 1935.

These answering defendants admit that when said ordinance was enacted and said orders issued, there existed a contract dated October 22, 1931, as shown by Exhibit A attached to plaintiff's original bill, between plaintiff and defendant Portsmouth Gas Company for the wholesale purchase of natural gas by said defendant Portsmouth Gas [fol. 77] Company from plaintiff and that said contract by its terms expired on or about November 1, 1936. Further answering these defendants deny each and every allegation in paragraph II of plaintiff's third amended and supplemental bill not herein expressly admitted to be true.

These answering defendants admit the allegations of Section III of said third amended and supplemental bill.

These answering defendants admit all of the allegations of section IV of plaintiff's third amended and supplemental

bill except the second clause thereof which allegation they specifically deny. Said allegation asserts that by the terms of the federal Natural Gas Act, the transaction between this plaintiff and the defendant Portsmouth Gas Company falls within the jurisdiction of the Federal Power Commission.

These answering defendants further say that neither said Natural Gas Act nor the jurisdiction of the Federal Power Commission thereunder is retroactive from the date of the passage of said Act, June 21, 1938, and that section 717b of said Act specifically sets the effective date thereof at December 21, 1938. They further say that since the municipal rate ordinance in question out of which this controversy arose was enacted on February 24, 1932, and expired by its terms two years later, that since the appeal of the Portsmouth Gas Company to defendant Commission from said ordinance was made in February, 1932, that since the orders of defendant Commission against the enforcement of which plaintiff seeks injunctive relief herein were made on April 18, 1935, and May 29, 1935, that since plaintiff commenced this action herein on July 12, 1935, and that since the transaction covering the sale of gas from plaintiff to the Portsmouth Gas Company is not interstate commerce, the regulation of said transaction is not a regulation of interstate commerce, and power and jurisdiction over said transaction now are and at all times herein mentioned have been full and complete in defendant Commission, including jurisdiction to make and enforce the orders complained of. [fol. 78] For want of knowledge and information, these answering defendants deny each and every allegation contained in paragraph one of section V of plaintiff's third amended and supplemental bill; they further deny each and every allegation of paragraph two of said section V.

### III

Further answering these answering defendants say that while the appeal of defendant Portsmouth Gas Company from the said distribution rate ordinance of defendant city of Portsmouth was pending before defendant Commission as alleged in plaintiff's original bill, there was also pending before said Commission the appeal of Columbus Gas and Fuel Company, a retail distributor of natural gas, from a similar rate ordinance of the city of Columbus, Ohio, dated

September 3, 1929, the hearings on which appeal had been completed a short time prior to October 3, 1932; and that there was also pending but unheard the appeals of said Columbus Gas and Fuel Company and of the Federal Gas and Fuel Company, which was also a distributor of natural gas, from a similar ordinance of said city of Columbus, Ohio, dated September 10, 1934. These companies making said appeals from said rate ordinances of the city of Columbus purchased large quantities of the gas sold and distributed by them in said city of Columbus from either the United Fuel Gas Company, plaintiff herein, or from the Ohio Fuel Gas Company which in turn purchased gas from said plaintiff which, as alleged in its original bill, is a West Virginia corporation but which has also been authorized to do business in Ohio since before 1916.

Both plaintiff, United Fuel Gas Company, and said Ohio Fuel Gas Company are and at all times mentioned were affiliated with such distributing companies, their successors and assigns, by reason of their capital stock being owned by Columbia Gas and Electric Corporation. The gas so sold by plaintiff and distributed by said Columbus Gas and Fuel Company, Ohio Fuel Gas Company and Federal Gas and Fuel Company, their successors and assigns, was delivered by plaintiff at two points in Ohio at or near the Ohio River, one of which points is a short distance east of [fol. 79] Pomeroy in Meigs County, Ohio, and the other is a short distance east of Ironton in Lawrence County, Ohio. These points are respectively about 70 and 35 miles east of Portsmouth, Ohio, and are the northern termini of plaintiff's line facilities. These answering defendants say that these transactions between plaintiff, United Fuel Gas Company, and both the Ohio Fuel Gas Company and defendant, Portsmouth Gas Company, were for the sale, transmission and delivery of plaintiff's gas for resale and were made at prices originally established between the parties by contract. They say further, however, that the performance of these contracts by plaintiff, United Fuel Gas Company, differed in that the sales and deliveries to Ohio Fuel Gas Company were made by plaintiff through pipe lines used by it for the sale, transmission and delivery of gas in wholesale quantities only, while in the latter case plaintiff, United Fuel Gas Company, out of the same pipe line which it used to transport its gas to defendant, Portsmouth Gas Com-

pany, also delivered other gas from the same sources directly and at the same time and place into its own distribution system by which it supplied local consumers in the town of New Boston, Ohio, which is a suburb of Portsmouth, and in the city of Ironton, Ohio.

On October 3, 1932, defendant Commission handed down its findings and order in the matter of the said appeal from the said Columbus, Ohio, rate ordinance of September 3, 1929, and found that a just and reasonable rate for plaintiff, United Fuel Gas Company, to charge for gas wholesale in Ohio at the Ohio River was 22.04¢ per M c.f. These findings and order of defendant Commission were appealed to both the Supreme Court of Ohio and the Supreme Court of the United States. The Supreme Court of Ohio on June 21, 1933, reversed defendant Commission and set such river rate at 17.79¢ per M c.f. but the Supreme Court of the United States by its action re-established such rate on May 21, 1934, at substantially 22.04¢. In 1935, plaintiff, United Fuel Gas Company, presented to defendant Commission as shown by its original bill of complaint herein its contract with defendant, Portsmouth Gas Company, establishing a river rate of 35¢ per M c.f. for the city of Portsmouth, defendant herein.

[fol. 80] Thereafter on August 18, 1939, defendant Commission handed down its findings and order in the matter of the said appeals from the said Columbus rate ordinance of September 10, 1934, and found that a just and reasonable system-wide rate for plaintiff, United Fuel Gas Company, to charge purchasers including Ohio Fuel Gas Company, successor to said Columbus Gas and Fuel Company and Federal Gas and Fuel Company, for gas wholesale at the Ohio River was 22.03¢ per M c.f. This system-wide rate was set with the knowledge and consent of plaintiff, United Fuel Gas Company, and when set made due allowance for the cost of gas delivered by said plaintiff Company at the city gate of Portsmouth, Ohio. These answering defendants further say that at the hearings of the appeals in which said system-wide rate was set, plaintiff herein, United Fuel Gas Company, produced and offered in evidence before defendant Commission its contract with Ohio Fuel Gas Company for the sale of gas for 26.5¢ at the two points described above in Lawrence and Meigs Counties, Ohio, which said rate was the same as that in the preceding case referred to above.



Wherefore, these answering defendants renew the prayer of their original answer.

The Public Utilities Commission of Ohio, George McConaughy, Chairman of said Commission; Dennis F. Dunlavy and Harry M. Miller, members of said Commission; Thomas J. Herbert, Attorney General of the State of Ohio; Kenneth L. Sater, Special Counsel for the Public Utilities Commission of Ohio; Thomas J. Herbert, Attorney General of Ohio; Kenneth L. Sater, Attorney for the Public Utilities Commission of Ohio, Solicitors for these Answering Defendants.

*Duly sworn to by George McConaughy. Jurat omitted in printing.*

[fol. 82] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY TO ANSWER—Filed August 27, 1941

To the Honorable Judges of Said Court:

The defendant Public Utilities Commission of Ohio has filed an answer to the Third Amended and Supplemental Bill of Complaint. A perusal of this answer indicates that there is nothing in it but a restatement of what was set up in the motion to dismiss, recently overruled by this Court, except a denial that the gas involved in this case is interstate commerce. This denial is in flat contradiction of the agreed statement of facts upon which the case was submitted originally and with the findings of the defendant Public Utilities Commission itself, as is shown by its order entered on the 29th day of May, 1935 (See page 50 of the printed bill of complaint and exhibits filed herein, being Exhibit "G" with said bill).

Respectfully submitted, Harold A. Ritz, Freeman T. Eagleson, for Plaintiff.



[fol. 83] IN UNITED STATES DISTRICT COURT

UNITED FUEL GAS COMPANY, Plaintiff,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, et al., Defendants

OPINION—Filed October 2, 1941

Before Allen, Circuit Judge, and Nevin and Underwood,  
District Judges

Per CURIAM:

Plaintiff, a West Virginia corporation, is a producer and purchaser of natural gas in that state. Defendants are The Public Utilities Commission of Ohio (hereinafter called The Commission); certain named state officials acting for it and on its behalf; The City of Portsmouth, Ohio, and Portsmouth Gas Company, an Ohio corporation. Due to their tenure of office and for various reasons changes have occurred from time to time in respect to individual defendants but proper substitutions have been made.

In 1931 plaintiff entered into a contract with defendant, Portsmouth Gas Company, for sale to that company of a supply of natural gas which Portsmouth Gas Company in turn sold and distributed to its customers in Portsmouth, Ohio. Portsmouth Gas Company is not a producer of natural gas and has no available gas of its own. That contract ran for five years. It expired on November 1, 1936. Prior to its expiration, the date thereof was extended, however, to November 1, 1937, (Amended Complaint and Stipulation of parties both filed November 20, 1936) and thereafter to November 1, 1941. (Second Amended Complaint filed March 8, 1939 and Third Amended Complaint filed April 8, 1941.)

After the two gas companies had entered into their contract, the City of Portsmouth passed an ordinance fixing certain rates for the distribution of natural gas in that city. Not content with those rates, the Portsmouth Gas Company appealed to The Public Utilities Commission of Ohio. For its determination of the question presented, The Commission found that it was necessary to bring plaintiff herein into the proceedings before it, and it was so ordered.

[fol. 84] Plaintiff appeared before The Commission and moved to be dismissed but its motion was denied.

After a hearing, The Commission found on April 18, 1935, that the rates fixed by the city ordinance of The City of Portsmouth "are manifestly unjust, unreasonable and insufficient to yield reasonable compensation" to the Portsmouth Gas Company, and it further found and ordered on said date, as follows: "The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this Commission.

"The Commission further finds that, in the absence of proof by the United Fuel Gas Company of a just and reasonable rate or charge to be maintained, imposed, charged and collected by it for the furnishing of natural gas to The Portsmouth Gas Company for distribution to consumers for public and private use in said City, it is unable to determine the just and reasonable rates to be substituted for the rates and charges fixed and prescribed by said ordinance which it has found herein to be unjust and unreasonable. It is, therefore,

"Ordered, That the said United Fuel Gas Company be, and hereby it is notified, directed and required to proceed, forthwith, and with all diligence to prepare and, within ninety days from the date hereof, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio, in conformity to the provisions of the General Session Order of this Commission adopted and promulgated under date of March first, 1934. • • •"

On May 14, 1935, plaintiff herein filed a "Petition for Rehearing" before The Commission on the order, insofar as it was affected thereby, entered on April 18, 1935.

Subsequently, to-wit: on May 29, 1935, The Commission denied this application for a rehearing and its order of April 18, 1935, was left in full force and effect. However, along with its denial of the application and in the same order, The Commission ordered as follows: "That the findings made and entered herein upon April eighteenth, 1935,

be, and hereby the same are supplemented with the following additional findings of fact, to-wit: That the gas being [fol. 85] delivered to The Portsmouth Gas Company, and which has been delivered to it under the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the States of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the State of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distribution system supplying the town of New Boston, in the State of Ohio, and the City of Ironton, in the State of Ohio, and that the distribution of natural gas in said town of New Boston and the said City of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company thru a distribution system owned by said The United Fuel Gas Company; and

"That the United Fuel Gas Company and The Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company of either of said companies, The United Fuel Gas Company and The Portsmouth Gas Company, any such relation, but the two companies are entirely separate and distinct from each other and are so operated.

"The Commission further finds that the following findings set forth and adopted in said findings as so adopted upon April eighteenth, 1935, to-wit:

"The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this Commission' should be, and hereby the same is modified, amended and supplemented to read as follows, to-wit:

"The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within

the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission.

[fol. 86] Thereafter, on July 3, 1935, plaintiff filed its bill of complaint herein praying, for the reasons alleged in the bill, *inter alia*, "That the orders of said The Public Utilities Commission of Ohio of April 18, 1935, and May 29, 1935, requiring this plaintiff to prove the cost of producing and delivering the natural gas furnished by it to the defendant Portsmouth Gas Company be declared null and void and of no effect." and that The Commission and certain of the defendants, acting for it and on its behalf "Be enjoined, inhibited and restrained from regulating or attempting to regulate the transactions between this plaintiff and the said defendant Portsmouth Gas Company under the contract referred to herein, and that, pending the determination of its right to such permanent injunction, an interlocutory injunction be granted in accordance with the foregoing."

Plaintiff prayed also for a temporary restraining order and, on July 3, 1935, a temporary restraining order as prayed for was signed and issued by the late Hon. Benson W. Hough,<sup>1</sup> then United States District Judge for the Southern District of Ohio.

In its bill of complaint, plaintiff sets out several reasons upon any or all of which it claims it is entitled to the relief prayed for.

At the outset and primarily, however, it challenges the jurisdiction of The Commission, claiming that The Commission "is without any jurisdiction to make such orders or requirements of this plaintiff;" and "that the statute under which it is acting; giving it such power as construed

<sup>1</sup> Subsequently, the cause came on for hearing and argument before a statutory three-judge court, of which Judge Hough was a member. Judge Hough died, however, before the case was decided necessitating a re-argument at a later date before the three-judge court, as now constituted.

by it, violates the commerce clause of the Constitution of the United States \* \* \*."

In their answer, filed July 30, 1935, The Commission and the other defendants named herein as acting for and in its behalf assert that The Commission does have jurisdiction; that the statute referred to is constitutional, and that the orders and directions of The Commission are in all respects proper and according to law.

On September 23, 1935, a stipulation, signed by counsel for the respective parties thereto, was filed, reading as follows: "It is stipulated by the parties hereto that the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, a copy of which is filed as Exhibit G with the bill, are the facts in regard to the natural gas and its movement pertinent to the consideration of the question involved in this case and the said findings of fact by the said The Public Utilities Commission may be treated by the Court as admissions of the parties in regard thereto \* \* \*."

On November 20, 1936, plaintiff filed an Amended Bill of Complaint and on March 8, 1939, its Second Amended and Supplemental Bill of Complaint, praying in each instance as in its original Bill.

On March 10, 1939, a Stipulation, signed by all the parties was filed herein, reading as follows: "It is hereby stipulated by the parties to this proceeding that the facts stated in the second amended bill of complaint herein are true and may be considered by the court as having been proven herein. This does not apply to Conclusions of Law."

On April 8, 1941, plaintiff filed a Third Amended and Supplemental Bill of Complaint reiterating therein the prayer of its original and Amended Bills.

On April 24, 1941, defendants, Public Utilities Commission of Ohio, George C. McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members, Thomas J. Herbert, Attorney General of the State of Ohio and Kenneth L. Sater, Special Counsel for said Commission, filed a motion to dismiss the Third Amended Bill of Complaint for the reasons and on the grounds set forth in the motion. This motion was overruled on July 8, 1941.

On July 28, 1941, defendants filed an application for leave to file their answer to plaintiffs third amended and supplemental complaint. On August 4, 1941, leave was granted



defendants so to do, and on the same day, to-wit: August 4, 1941, defendants filed their answer.

The cause is now before the Court on plaintiff's Third Amended and Supplemental Bill of Complaint; defendants' answer thereto (just referred to) and the record, including the Stipulation (above) of the parties as to the facts, which as alleged in the Third Amended Bill are in substance the same as stated in the Second Amended Bill (and in the original Bill and Amended Bill as well, except for a reference to the "National Gas Act" in the Second Amended Bill,) except that it is recited in the Third Amended Complaint that the contract between plaintiff and defendant, Portsmouth Gas Company, referred to in the Second Amended Complaint has been continued by the parties thereto "Upon the same terms and conditions as provided by said last extension."

[fol. 88] In their brief (Pp. 5-6), counsel for The Commission and those defendants acting for it and on its behalf say "It may be conceded upon the basis of the record taken before The Commission that the transportation into the State of Ohio by pipe lines of gas produced by the Plaintiff in West Virginia and Kentucky is interstate commerce. It may be further conceded that the primary power to regulate the transportation of gas in interstate commerce rests with the Congress of the United States and that the Congress of the United States has not yet seen fit to exercise that power. It may be admitted further that if the mere fact that the transportation of such gas in interstate commerce precludes the state from exercising any jurisdiction thereover despite the fact that Congress has not seen fit to exercise its powers, and despite the fact that the exercise of such jurisdiction may be necessary in the interests of local regulation and despite any other facts which may be presented in a particular case, then The Public Utilities Commission of Ohio has no jurisdiction over the United Fuel Gas Company in the case that is here presented.

"On the other hand, if the interstate Transportation of gas does not of itself preclude state regulation in a proper case where the nature of the regulation is primarily local in character, and where it is essential to the exercise of the regulatory functions of a public service commission, and where the particular facts of the case warrant the exercise

of the power conferred by the legislative enactment in the state in question, and where Congress has failed to exercise its paramount authority, then the orders of The Public Utilities Commission of Ohio which are here sought to be enjoined may be sustained."

The sale and delivery of natural gas to the Portsmouth Gas Company is thus clearly interstate commerce, and compilation of voluminous data has been demanded for use in a proceeding by the State Commission to determine the fair and reasonable rate to be collected by the local distributing company with which the plaintiff has contracted to sell its product and services for a definite period at a definite price. The two contracting parties are entirely separate and distinct from each other and are so operated. In view of such relationship and the nature of the inquiry before the Ohio Commission it is believed that the jurisdiction sought to be asserted falls outside the orbit of state regulation now permissible.

Since this suit was instituted, the Congress of the United States, to-wit, on June 21, 1938, passed an Act known as the "Natural Gas Act" entitled "An Act to regulate the transportation and sale of natural gas in interstate commerce, and for other purposes." Title 15, Sec. 717, U. S. C. A. c. 556, Sec. 1, 52 Stat. 821. Among others, the Natural Gas Act contains the following provisions: "Section 1. [fol. 89] (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use; and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

"Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission \* \* \* shall be just and reasonable \* \* \*"

"Sec. 5. (a) Whenever the Commission \* \* \* shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company \* \* \* sub-

ject to the jurisdiction of the Commission . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . .

"Sec. 5. (b) The Commission upon its own motion, or upon the request of any State Commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas."

"Sec. 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

"(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction."

Natural Gas Pipe Line Co. v. Slattery, 302 U. S. 300, held a state statute which demands access to books and accounts of a pipe line company selling natural gas in interstate commerce and requires production of the information [fol. 90] sought, to be not unconstitutional. That case involved a transaction between public utilities which were affiliates. Here the plaintiff and the defendant the Portsmouth Gas Company are conceded by the defendant Commission to have no connection with each other by way of interlocking directorates, unity of interest, or affiliation. They are entirely separate and distinct from each other and are so operated. Their dealings were and are at "arm's length." Cf. Natural Gas Pipe Line Co. v. Slattery, *supra*, at 306. This is an important distinction and completely differentiates the operation herein involved, from that held to be subject to examination in the Slattery case. However, it is not the sole differentiating feature between the two

cases, for the Slattery case was decided prior to the enactment of the "Natural Gas Act," supra, the provisions of which, in our opinion, compel the issuance of the injunction prayed for.

Regardless of the right or jurisdiction of the Ohio Commission to issue the orders herein complained of on April 18, 1935, and May 29, 1935, it was deprived of any further jurisdiction by the passage of the Natural Gas Act on June 21, 1938. The transactions involved are squarely covered by the Natural Gas Act, constituting as they do "the sale in interstate commerce of natural gas for resale for ultimate public consumption" (Sec. 1 (b) ). Under this statute the Public Utilities Commission of Ohio might have filed a complaint charging that the rates made by the United Fuel Gas Company in the sale of its gas to the Portsmouth Gas Company are unjust, unreasonable, or unduly discriminatory or preferential, and the Federal Commission thereupon would have been empowered to determine the just and reasonable contract rate to be thereafter observed and enforced. Section 5 (a). The Federal Power Commission is required to "make available" to the Ohio Commission such information and reports as may be of assistance in state regulation, and may upon request from the Ohio Commission make available as witnesses any of its own trained experts. Section 17 (c). We think that these provisions are significant.

Prior to the enactment of the Natural Gas Act it was permissible for the state to regulate local features of interstate commerce in gas. *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 29; *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465. Since the federal statute has been enacted, giving to the Federal Power Commission the power to fix the contract rate between plaintiff and the Portsmouth Gas Company, the Congress has occupied the field and the power is exclusive in the Federal Power Commission. The right to conduct investigations [fol. 91] as to contracts for sale of gas in interstate commerce, which is an incident to the rate-making power, is also exclusively confided to the Federal Power Commission. We conclude that since the passage of the Natural Gas Act the Ohio Commission and these defendants acting for it and on its behalf have been and are without legal right or

authority to enforce the orders of the Commission entered April 18, 1935, and May 29, 1935.

Upon the record here the court finds, therefore, that an interlocutory injunction should be granted enjoining defendant, The Public Utilities Commission of Ohio and each and all other defendants herein acting for it or on its behalf from enforcing or seeking to enforce, or execute, the orders of the Commission entered by it on April 18, 1935, and May 29, 1935, against plaintiff herein.

The court adopts as its Findings of Fact herein, the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, to the extent and as set forth and referred to by the parties to the Stipulation filed herein on September 23, 1935.

Each party to pay its own costs.

Counsel may prepare and submit an order accordingly.

Florence E. Allen, Judge, U. S. Circuit Court of Appeals. Robert R. Nevin, Judge, U. S. District Court. Mell G. Underwood, Judge, U. S. District Court.

#### APPEARANCES:

For Plaintiff: Harold A. Ritz, Charleston, W. Va.; Freeman T. Eagleston, Columbus, Ohio.

For Defendant, The Public Utilities Commission of Ohio, et al.: Hon. Thomas J. Herbert, Attorney General of Ohio, Kenneth L. Sater, Special Counsel for The Commission, Columbus, Ohio.

For Defendant, The City of Portsmouth, Ohio: W. L. Dickey, Portsmouth, Ohio.

For Defendant, Portsmouth Gas Company: John F. Beasley.

[fol. 92] IN UNITED STATES DISTRICT COURT

UNITED FUEL GAS COMPANY, Plaintiff,

VS.

THE PUBLIC UTILITIES COMMISSION OF OHIO, Defendant

DECREE—Filed January 16, 1942

This cause came on to be heard upon the original bill and exhibits therewith filed, and upon the several amended and supplemental bills, the answer of the several defendants,



the agreed statement of facts, and all orders heretofore made and entered herein; and the parties having offered nothing further in support of their respective contentions the case is submitted for final decision; from all of which matters so submitted, the Court is of the opinion, for reasons stated in writing and filed with the record herein, that the plaintiff is entitled to the relief prayed for in its original and amended and supplemental bills.

It is therefore adjudged, ordered and decreed that the defendant, Public Utilities Commission of Ohio, and each and all other defendants herein acting for it or on its behalf be and they hereby are enjoined from enforcing or seeking to enforce or execute against the plaintiff the orders of said The Public Utilities Commission of Ohio entered by it April 18, 1935, and May 29, 1935, which orders are exhibited with the plaintiffs' original bill filed herein.

Each party shall pay its own costs.

To all of which defendants jointly and severally except, and their exceptions are hereby noted of record.

Judge Florence E. Allen, Judge United States Circuit Court of Appeals; Robert R. Nevin, Judge United States District Court; Mel G. Underwood, Judge United States District Court.

January 16, 1942.

[fol. 93] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PUBLIC UTILITIES COMMISSION FOR APPEAL—  
Filed April 9, 1942

Applicants, The Public Utilities Commission of Ohio, George McConaughy, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commission, Thomas J. Herbert, Attorney General of the State of Ohio and Kenneth L. Sater, Special Counsel for said the Public Utilities Commission of Ohio, conceiving themselves aggrieved by the decision, and order and decree made and entered on the second day of October, 1941, and the sixteenth day of January, 1942, respectively, in the above-entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States for the

reasons specified in the assignment of errors which is filed herewith and pray that this appeal may be allowed and that a transcript of the record, proceedings, and papers, upon which said injunction and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

Thomas J. Herbert, Kenneth L. Sater, Attorneys for  
Applicants, State House Annex, Columbus, Ohio.

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted].

ASSIGNMENT OF ERRORS—Filed April 9, 1942

Now come applicants, The Public Utilities Commission of Ohio, George McConaughy, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commission, Thomas J. Herbert, Attorney General of the State of Ohio, and Kenneth L. Sater, Special Counsel for said the Public Utilities Commission of Ohio, and in connection with their appeal, say that in the record and proceedings in this cause manifest errors intervene to their prejudice and injury and, in connection with their said appeal, assign the following errors upon which they rely to reverse the order and decree heretofore entered herein, to wit:

1. The District Court erred in holding that it had jurisdiction of the subject matter of the cause of action herein.
2. The District Court erred in holding that the sale of natural gas by the United Fuel Gas Company to the Portsmouth Gas Company constitutes interstate commerce.
3. The District Court erred in holding that the contract between the United Fuel Gas Company and the Portsmouth Gas Company was the result of arm's length bargaining.
4. The District Court erred in holding that the orders in question of the Public Utilities Commission of Ohio, dated April 18, 1935, and May 29, 1935, respectively, were outside of either the orbit of state regulation or the jurisdiction of such Commission.

[fol. 95] 5. The District Court erred in holding that either appeal of the Portsmouth Gas Company to the Public Utilities Commission of Ohio, or the cause of action in the case at bar is in any way affected by the enactment of the federal Natural Gas Act.

6. The District Court erred in holding that the jurisdiction of the Public Utilities Commission of Ohio to make and enforce its orders of April 18, 1935, and May 29, 1935, was in any way affected by the enactment of the federal Natural Gas Act.

7. The District Court erred in holding that the dealings between the United Fuel Gas Company and the Portsmouth Gas Company were, or are now, protected by the federal Natural Gas Act from regulation by the Public Utilities Commission of Ohio.

8. The District Court erred in holding that any rate which might be set by the Federal Power Commission, or that any information or reports which such Commission might make available to the Public Utilities Commission of Ohio could be used in the determination of a just and reasonable distribution rate for the sale of natural gas in the city of Portsmouth, Ohio, for the period of time in question.

9. The District Court erred in holding that the Federal Power Commission has or ever had jurisdiction over any dealings between the United Fuel Gas Company and the Portsmouth Gas Company during the period of time in question.

10. The District Court erred in holding that the federal Natural Gas Act compels the granting of any relief at all to the United Fuel Gas Company in the case at bar.

11. The District Court erred in enjoining the above-described orders of the Public Utilities Commission of Ohio.

12. The District Court erred in holding that the above-described orders of the Public Utilities Commission of Ohio interfere with interstate commerce, or impair any contract or deprive the United Fuel Gas Company of any property without due process of law.

[fol. 96] 13. The final order of the District Court herein, dated January 16, 1942, and the decision in support thereof, dated October 2, 1941, are not supported by the law or the evidence.

14. The District Court erred in overruling the motion to strike United Fuel Gas Company's original and three amended and supplemental petitions from the files.

Wherefore, applicants pray that the order and decree of the said District Court be reversed.

Thomas J. Herbert, Kenneth L. Sater, Attorneys for Applicants.

[fol. 97] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—April 9, 1942.

In the above entitled cause applicants, The Public Utilities Commission of Ohio, George McConnaughey, Chairman, Dennis F. Dunlavy and Harry M. Miller, members, Thomas J. Herbert, Attorney General of Ohio and Kenneth L. Sater, Special Counsel for said the Public Utilities Commission of Ohio, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order and decree of this court entered January 16, 1942, permanently enjoining enforcement of two orders of said the Public Utilities Commission of Ohio dated April 18, 1935, and May 29, 1935, (a copy of which orders is attached to complainant's bill of complaint herein and marked Exhibits "E" and "G"), and applicants having also made and filed an assignment of errors and prayer for reversal, and having in all respects conformed to the statutes and rules of court in such cases made and provided:

It is therefore, considered, ordered, adjudged and decreed that the appeal be and the same hereby is allowed and is made returnable within 40 days from the date hereof;

It is further ordered that the clerk of this Court prepare and certify a transcript of the record, proceedings and final decree in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within 40 days from the date hereof:

It is further ordered that applicants give bond as security for costs on appeal in the sum of \$500.00.

April 9, 1942.

Mell G. Underwood, U. S. District Judge.

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[fol. 98] Citation in usual form to United Fuel Gas Company omitted in printing.

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[fols. 99-100] Cost Bond on Appeal for \$500 approved and filed April 9, 1942 omitted in printing.

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[fol. 101] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR RECORD ON APPEAL—Filed April 9, 1942

Applicants, The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry Miller, members of said Commission, Thomas J. Herbert, Attorney General of the State of Ohio, and Kenneth L. Sater, Special Counsel for said the Public Utilities Commission of Ohio, pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States and for the purpose of enabling the clerk to prepare the record for appeal herein from the final order and decree of the District Court dated January 16, 1942, to the Supreme Court of the United States, hereby request the clerk to include in the record on such appeal the herein-after indicated papers and pleadings, to wit:

Bill of complaint and exhibits attached thereto.

• Appearances.

Answer.

Stipulation.

Amended Bill.

Second amended and supplemental bill.

Supplemental answer.



Third amended and supplemental bill.  
Motion.

Order overruling motion.

Answer to third amended and supplemental bill.

Complainant's statement.

Decision.

Final order and decree.

Petition for appeal.

Assignment of errors.

Order allowing appeal.

Jurisdictional statement.

[fol. 102] Notice.

Citation with acknowledgement of service on appellee and receipt therefor.

Cost Bond on Appeal.

Thomas J. Herbert, Kenneth L. Sater, Attorneys for  
Applicants.

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[fol. 103] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION MODIFYING PRAECIPE FOR RECORD ON APPEAL—  
Filed April 22, 1942

It is hereby stipulated and agreed that the praecipe for the record on appeal heretofore filed herein shall be and hereby is modified to include the separate answers of defendants City of Portsmouth and The Portsmouth Gas Company.

Harold A. Ritz, Counsel for United Fuel Gas Company, Complainant-Appellee. Thomas J. Herbert, Kenneth L. Sater, Counsel for Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commission, and Thomas J. Herbert, Attorney General of the State of Ohio, and Kenneth L. Sater, Special Counsel for the Public Utilities Commission of Ohio, Defendants-Appellants.

[fol. 104] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT, THE CITY OF PORTSMOUTH, OHIO—  
Filed September 4, 1935

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio:

Now comes the City of Portsmouth, Ohio, and files this its answer in the above styled and numbered cause as follows:

1. This answering defendant admits the allegations of fact stated in Item 1 of the bill of complaint filed by the United Fuel Gas Company.

2. This answering defendant admits the allegations of fact stated in Item 2 of said complaint except that it denies the allegation that the gas produced or purchased from other producers by the plaintiff in the states of West Virginia and Kentucky and transported in a continuous flow from the said states of West Virginia and Kentucky is not co-mingled with gas produced or purchased in Ohio and without reducing the pressure to which the same is so transported prior to such delivery and that said sale and delivery of gas is not interstate commerce.

[fol. 105] This answering defendant further denies that the attempt of the defendant, The Public Utilities Commission of Ohio to prescribe the price to which said United Fuel Gas Company shall sell its gas to the defendant, The Portsmouth Gas Company, regulates or interferes with the United Fuel Gas Company's business in interstate commerce or in any way violates the provisions of Section 8 of Article I of the Constitution of the United States which delegates to the Congress of the United States the power to regulate commerce with foreign nations or between the states of the United States.

This answering defendant avers that the United Fuel Gas Company out of the same pipe line used to transport its gas to The Portsmouth Gas Company delivers and distributes gas to the cities of New Boston and Ironton in the State of Ohio, which distribution system is owned and through which it charges the inhabitants of said city for

such gas. Said company also sells gas from the same pipe line supplying and furnishing gas to the City of Portsmouth, Ohio, to industries in Ohio.

This answering defendant further avers that after said gas is transported through this pipe line carrying the said United Fuel Gas Company's gas from West Virginia and Kentucky into Ohio, that it is broken down by reducing the pressure and sold at the gates of the City of Portsmouth, Ohio, in a condition different than when it enters the State of Ohio.

3. This answering defendant admits the allegations of fact stated in paragraph 3 of the bill of complaint filed by the plaintiff.

4. This answering defendant admits the allegations of fact stated by plaintiff in paragraph 4 of the bill of complaint.

5. This answering defendant admits the allegations of fact stated in paragraph 5 of the plaintiff's bill of complaint.

6. This answering defendant admits the allegations of fact stated in paragraph 6 of the bill of complaint except that this defendant denies that gas produced by United Fuel Gas Company and transported by the same pipe line [fol. 106] that is used to transport gas to the Portsmouth Gas Company, is distributed by United Fuel Gas Company to its customers in other Ohio towns without disturbing or interrupting the continuous flow of gas in said pipe line, either by reducing the pressure therein or in any other manner; this defendant further denies that the transaction covering the sale of gas from the United Fuel Gas Company to the Portsmouth Gas Company is interstate commerce; this defendant denies that the power and jurisdiction assumed by the Public Utilities Commission of Ohio to regulate the price at which United Fuel Gas Company shall sell its gas to the Portsmouth Gas Company is a regulation of interstate commerce, and denies that it is in violation of that part of Section 8 of Article I of the Constitution of the United States, conferring upon the Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

This defendant further denies that the orders of the Public Utilities Commission of Ohio referred to in the bill of complaint filed herein, and the statute law of the State of Ohio upon which the same are based, are null and void or in violation of that part of Section 10 of Article I of the Constitution of the United States which prohibits any state from passing any law impairing the obligation of contracts or that the effect of said statute of the State of Ohio as construed by the Public Utilities Commission of Ohio in said orders impairs or abrogates any lawful contract existing between United Fuel Gas Company and the Portsmouth Gas Company.

Defendant further denies that the interests of United Fuel Gas Company in said contract with Portsmouth Gas Company is a property right, or that it constitutes property of United Fuel Gas Company, or that the action of the defendant, the Public Utilities Commission of Ohio abrogates or destroys any property right belonging to United Fuel Gas Company or that it deprives United Fuel Gas Company of any valuable property without due process [fol. 107] of law, or that it denies to United Fuel Gas Company the equal protection of the laws or that it is in violation of Section 1 of the fourteenth article of Amendment of the Constitution of the United States. This defendant further denies that a compliance with the orders of the Public Utilities Commission of Ohio would entail upon United Fuel Gas Company, the expenditure of a very large sum of money or that such expense would aggregate, more than one hundred thousand dollars (\$100,000.00).

This answering defendant further denies the allegations contained in said paragraph 6 of the bill of complaint to the effect that the Public Utilities Commission of Ohio is without any jurisdiction to make the orders complained of or that the statutes under which it is acting violates the commerce clause of the Constitution of the United States, or that the expenditure of any large sum of money would be occasioned thereby. It further denies that United Fuel Gas Company will be irredeemably injured and damaged by the carrying out of the orders of the Public Utilities Commission of Ohio complained of, or that United Fuel Gas Company will be damaged to any extent whatever by carrying out said orders.

7. Defendant denies each and every allegation of fact stated in paragraph 7 of the bill of complaint.

This answering defendant further denies each and all of the allegations of fact stated in the plaintiff's bill of complaint, except insofar as the same are herein expressly and definitely admitted.

Wherefore, this answering defendant prays that the temporary restraining order heretofor granted in this cause on the 3rd day of July 1935 be vacated and set aside and that on final consideration the application for the interlocutory injunction be denied said plaintiff; said bill of complaint filed by it be dismissed at plaintiff's cost and that this answering defendant go hence without day and have judgment for its costs expended herein.

[fol. 108] The City of Portsmouth, Ohio, By W. L. Dickey, Its Attorney.

*Duly sworn to by John M. Sallady. Jurat omitted in printing.*

[fol. 109]. IN UNITED STATES DISTRICT COURT

[Title omitted]

SEPARATE ANSWER OF DEFENDANT, PORTSMOUTH GAS COMPANY—Filed September 23, 1939

To the Honorable Judges of the District Court of the United States, Southern District of Ohio:

Comes now the defendant Portsmouth Gas Company and files its answer in the above entitled cause and for its answer to plaintiffs' bill herein says:

1. This defendant admits the allegations of fact stated in paragraph 1 of the bill of complaint.

2. This defendant admits that this suit is of a civil nature in equity and is brought for the purpose of obtaining a declaratory judgment adjudicating that the two orders of the Public Utilities Commission of Ohio referred to in paragraph 2 of the bill of complaint are unconstitutional and void and for the purpose of enjoining the enforcement of said orders as alleged in paragraph 2 of the bill of complaint.



This defendant neither admits nor denies the other allegations of fact stated in paragraph 2 of the bill of complaint.

3. This defendant admits the allegations of fact stated in paragraph 3 of the bill of complaint.

4. This defendant admits the allegations of fact stated in paragraph 4 of the bill of complaint.

[fol. 110] 5. This defendant admits the allegations of fact stated in paragraph 5 of the bill of complaint.

6. This defendant neither admits nor denies the allegations of fact stated in paragraph 6 of the bill of complaint.

7. This defendant neither admits nor denies paragraph 7 of the bill of complaint.

Wherefore having fully answered the bill of complaint and the plaintiff having prayed no relief against this defendant, this defendant prays that on final consideration, the bill of complaint be dismissed as to this answering defendant and that this defendant may go hence without day and have judgment against the plaintiff for its costs.

(Signed) John T. Beasley, Counsel for the defendant Portsmouth Gas Company.

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[fols. 111-112] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 113] Citation in usual form to City of Portsmouth and Portsmouth Gas Company omitted in printing.

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[fol. 114] IN UNITED STATES DISTRICT COURT

ACKNOWLEDGEMENT OF SERVICE OF APPEAL PAPERS AND STATEMENT OF CITY OF PORTSMOUTH AND PORTSMOUTH GAS CO., ACCEPTING JURISDICTIONAL STATEMENT AS STATING THE BASIS FOR APPEAL—May 14, 1942

Receipt is hereby acknowledged of a copy of the papers, including this citation, filed by The Public Utilities Com-

mission of Ohio, et al. in its appeal entitled Public Utilities Commission of Ohio, et al. vs. United Fuel Gas Company, No. 1216 in the Supreme Court of the United States. The jurisdictional statement is accepted as stating the basis for such appeal.

The City of Portsmouth, Ohio, by Ernest G. Littleton, Its City Solicitor. The Portsmouth Gas Company, by C. W. Baughn, Its General Manager.

[fol. 115] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED PRAECIPE

Applicants, The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry Miller, members of said Commission, Thomas J. Herbert, Attorney General of Ohio, and Kenneth L. Sater, Special Counsel for said The Public Utilities Commission of Ohio, pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States and for the purpose of enabling the clerk to prepare the record for appeal herein from the final order and decree of the District Court dated January 16, 1942, to the Supreme Court of the United States, hereby requests the clerk to include in the record on such appeal, in addition to the papers and pleadings mentioned in the original praecipe, the hereinafter indicated papers and pleadings to-wit: Citation to The City of Portsmouth and The Portsmouth Gas Company and the receipt of said City and Company attached to such Citation.

Thomas J. Herbert, Kenneth L. Sater, Attorneys for Applicants.

[fols. 116-117] Clerk's certificate to foregoing papers omitted in printing.

[fol. 118] **IN THE SUPREME COURT OF THE UNITED STATES**

[Title omitted]

**STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF  
RECORD—Filed May 9, 1942**

Now come appellants, The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commission, Thomas J. Herbert, Attorney General of Ohio, and Kenneth L. Sater, Special Counsel for said the Public Utilities Commission of Ohio, pursuant to paragraph 9 of Rule 13 of the Revised Rules of this Court and say that the points on which they intend to rely in the case at bar are as follows:

1. The sale of natural gas by appellee, United Fuel Gas Company, to the Portsmouth Gas Company does not constitute interstate commerce under the facts established in the case at bar.

2. The two orders in question of appellee Commission, dated April 18, 1935, and May 29, 1935, impair no contract between appellee United Fuel Gas Company and the Portsmouth Gas Company for the wholesale sale and delivery of natural gas because such contract was not made at arm's length and does not constitute arm's length bargaining.

3. The two said orders of appellant Commission do not deprive appellee United Fuel Gas Company of any property without due process of law.

[fol. 119] 4. The jurisdiction of appellant Commission to promulgate and enforce its two said orders was not superseded in the case at bar by the enactment of the federal Natural Gas Act.

Appellants consider the entire record, as certified, to be necessary to a determination of this case on the merits.

Thomas J. Herbert, Kenneth L. Sater, Attorneys for  
Appellants. State House Annex, Columbus, Ohio.

[fol. 120] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—June 1, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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Endorsed on Cover: File No. 46,544 D. C. U. S: Southern Ohio. Term No. 87. The Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, et al., Appellants, vs. United Fuel Gas Company, et al. Filed May 5, 1942. Term No. 87 O. T. 1942.

(1239)





FILE COPY  
MAY 5 1942  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1216 87

THE PUBLIC UTILITIES COMMISSION OF OHIO,  
GEORGE McCONNAUGHEY, CHAIRMAN OF SAID COM-  
MISSION, ET AL.,

• *Appellants,*

*vs.*

UNITED FUEL GAS COMPANY, ET AL.

• APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF OHIO.

STATEMENT AS TO JURISDICTION.

✓ THOMAS J. HERBERT,

✓ KENNETH L. SATER,

*Counsel for Appellants.*



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### STATUTES CITED.

Federal Natural Gas Act (June 21, 1938, c. 556, sec. 1, 52 Stat. 821; U. S. C. A. Tit. 15, sec. 717, et seq.).....	2
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Judicial Code, Section 266 (June 18, 1910, c. 309, sec. 17, 36 Stat. 557, as amended, U. S. C. A. Tit. 28, sec. 380). .....	3



**IN THE DISTRICT COURT OF THE UNITED STATES,  
SOUTHERN DISTRICT OF OHIO,  
EASTERN DIVISION**

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**In Equity No. 1141.**

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**UNITED FUEL GAS COMPANY,**  
*Complainant,*  
*vs.*

**PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,**  
*Defendants.*

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**JURISDICTIONAL STATEMENT.**

Filed April 9, 1942.

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, applicants, the Public Utilities Commission of Ohio, George McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members of said Commission, Thomas J. Herbert, Attorney General of the State of Ohio, and Kenneth L. Sater, Special Counsel for said the Public Utilities Commission of Ohio, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain the appeal in this cause:

1. In 1932, the Portsmouth Gas Company, an Ohio corporation doing business in the city of Portsmouth, Ohio,



appealed to the Public Utilities Commission of Ohio from a two-year gas distribution rate ordinance of said city. Said the Portsmouth Gas Company was purchasing, at a price established by contract with it, natural gas from the United Fuel Gas Company for distribution in the City of Portsmouth; delivery of such gas was made to it by the United Fuel Gas Company at the Portsmouth city gate from a line or lines used by said the United Fuel Gas Company to distribute gas locally in other Ohio municipalities. Said Commission joined the United Fuel Gas Company, a West Virginia corporation, as a party to such proceeding before it, and in two orders dated April 18, 1935, and May 29, 1935, directed it to prepare and submit testimony and exhibits tending to prove a reasonable and just rate to be charged by it to the Portsmouth Gas Company at the Portsmouth city gate for the furnishing of natural gas for distribution within said city of Portsmouth.

2. Pursuant to section 24 of the Judicial Code (March 3, 1911, c. 231, sec. 24, par. 1, 36 Stat. 1091, as amended; U. S. C. A. Tit. 28, sec. 41, subd. (1), the United Fuel Gas Company filed its complaint at once against these applicants and others before a three-judge court in the United States District Court for the Southern District of Ohio, Eastern Division, at Columbus, Ohio, claiming that the two orders mentioned above are unconstitutional and void, in that (1) the orders of applicant Commission interfered with interstate commerce, (2), the orders of applicant Commission impaired the obligation of its contract, (3), the orders of applicant Commission deprived it of property without due process of law and, later, (4), the jurisdiction of the applicant Commission to make the orders in question was superseded by the enactment of the federal Natural Gas Act (June 21, 1938, c. 556, sec. 1, 52 Stat. 821; U. S. C. A. Tit. 15, sec. 717 et seq.). It was also

asserted that the amount in controversy exceeds the sum of Three Thousand (\$3,000) Dollars exclusive of interest and costs.

3. In October 1941, a decision was handed down and on January 16, 1942, there was granted an order and decree which permanently enjoined, inhibited, and restrained applicants from enforcing or executing the said two orders. From this order and decree supported by the written decision the said applicants have appealed.

4. A copy of the District Court's decision, unreported, is attached hereto.

5. Applicants' appeal was filed on the 9 day of April, 1942, and has been presented to said District Court herewith.

6. The statutory jurisdiction of the Supreme Court of the United States to review by direct appeal the order and decree here complained of is conferred by section 238 of the Judicial Code (March 3, 1911, c. 231, sec. 238, 36 Stat. 1156 as amended; U. S. C. A. Tit. 28, sec. 345) and section 266 of the Judicial Code (June 18, 1910, c. 309, sec. 17, 36 Stat. 557 as amended; U. S. C. A. Tit. 28, sec. 380).

7. The following cases sustain the jurisdiction of the Supreme Court of the United States in the premises:

*Railroad Commission of Texas v. Pullman Company*,  
312 U. S. 496, 61 Sup. Ct. Rep. 643, 85 L. Ed. 971;

*Railroad Commission v. Rowan and Nichols Oil Company*, 311 U. S. 570, 61 Sup. Ct. Rep. 343, 85 L. Ed. 358;

*Driscoll, et al., v. Edison Light & Power Company*,  
307 U. S. 104, 59 Sup. Ct. Rep. 83, 83 L. Ed. 1134;

*Clark v. Poor, et al.*, 274 U. S. 554, 47 Sup. Ct. Rep. 702, 71 L. Ed. 1199;

*Prendergast, et al., v. New York Telephone Company,*  
262 U. S. 43, 43 Sup. Ct. Rep. 466, 67 L. Ed. 853;  
*Oklahoma Natural Gas Company v. Russell, et al.,*  
261 U. S. 290, 43 Sup. Ct. Rep. 353, 67 L. Ed. 679.

Respectfully submitted,

THOMAS J. HERBERT,  
KENNETH L. SATER,  
*Attorneys for Applicants.*

**APPENDIX "A".**

**IN THE UNITED STATES DISTRICT COURT, SOUTH-  
ERN DISTRICT OF OHIO, EASTERN DIVISION.**

**No. 1141 In Equity.**

**(Columbus)**

**UNITED FUEL GAS COMPANY, Plaintiff,**

**vs.**

**THE PUBLIC UTILITIES COMMISSION OF OHIO, et al.,  
Defendants.**

**DECISION—October 2, 1941.**

**Before Allen, Circuit Judge, and Nevin and Underwood,  
District Judges.**

**PER CURIAM:**

Plaintiff, a West Virginia corporation, is a producer and purchaser of natural gas in that state. Defendants are The Public Utilities Commission of Ohio (hereinafter called The Commission); certain named state officials acting for it and on its behalf; The City of Portsmouth, Ohio; and Portsmouth Gas Company, an Ohio corporation. Due to their tenure of office and for various reasons changes have occurred from time to time in respect to individual defendants but proper substitutions have been made.

In 1931 plaintiff entered into a contract with defendant, Portsmouth Gas Company, for sale to that company of a supply of natural gas which Portsmouth Gas Company in turn sold and distributed to its customers in Portsmouth, Ohio. Portsmouth Gas Company is not a producer of natural gas and has no available gas of its own. That contract ran for five years. It expired on November 1, 1936. Prior to its expiration, the date thereof was extended, however, to November 1, 1937, (Amended Complaint and Stipulation of parties both filed November 20, 1936) and thereafter to November 1, 1941. (Second Amended Complaint

filed March 8, 1939 and Third Amended Complaint filed April 8, 1941).

After the two gas companies had entered into their contract, the City of Portsmouth passed an ordinance fixing certain rates for the distribution of natural gas in that city. Not content with those rates, the Portsmouth Gas Company appealed to The Public Utilities Commission of Ohio. For its determination of the question presented, The Commission found that it was necessary to bring plaintiff herein into the proceedings before it, and it was so ordered.

Plaintiff appeared before The Commission and moved to be dismissed but its motion was denied.

After a hearing, The Commission found on April 18, 1935, that the rates fixed by the city ordinance of The City of Portsmouth "are manifestly unjust, unreasonable and insufficient to yield reasonable compensation" to the Portsmouth Gas Company, and it further found and ordered on said date, as follows: "The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this Commission.

"The Commission further finds that, in the absence of proof by the United Fuel Gas Company of a just and reasonable rate or charge to be maintained, imposed, charged and collected by it for the furnishing of natural gas to The Portsmouth Gas Company for distribution to consumers for public and private use in said City, it is unable to determine the just and reasonable rates to be substituted for the rates and charges fixed and prescribed by said ordinance which it has found herein to be unjust and unreasonable. It is, therefore,

"Ordered, That the said United Fuel Gas Company be, and hereby it is notified, directed and required to proceed, forthwith, and with all diligence to prepare and, within ninety days from the date hereof, to complete a presentation of all pertinent and relevant testimony and exhibits tending to



prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio, in conformity to the provisions of the General Session Order of this Commission adopted and promulgated under date of March first, 1934. \* \* \*

On May 14, 1935, plaintiff herein filed a "Petition for Rehearing" before The Commission on the order, insofar as it was affected thereby, entered on April 18, 1935.

Subsequently, to-wit: on May 29, 1935, The Commission denied this application for a rehearing and its order of April 18, 1935, was left in full force and effect. However, along with its denial of the application and in the same order, The Commission ordered as follows: "That the findings made and entered herein upon April eighteenth, 1935, be, and hereby the same are supplemented with the following additional findings of fact, to-wit: That the gas being delivered to The Portsmouth Gas Company, and which has been delivered to it under the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the States of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the State of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distribution system supplying the town of New Boston, in the State of Ohio, and the City of Ironton, in the State of Ohio, and that the distribution of natural gas in said town of New Boston and the said City of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company through a distribution system owned by said The United Fuel Gas Company; and

"That the United Fuel Gas Company and The Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company of

either of said companies, The United Fuel Gas Company and The Portsmouth Gas Company, any such relation, but the two companies are entirely separate and distinct from each other and are so operated.

"The Commission further finds that the following findings set forth and adopted in said findings as so adopted upon April eighteenth, 1935, to-wit:

'The Commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; and that the rates to be charged therefor are subject to the jurisdiction of this Commission'

should be, and hereby the same is modified, amended and supplemented to read as follows, to-wit:

'The Commission further finds that the furnishing of natural gas by the United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service; and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission.'"

Thereafter, on July 3, 1935, plaintiff filed its bill of complaint herein praying, for the reasons alleged in the bill, *inter alia*. "That the orders of said The Public Utilities Commission of Ohio of April 18, 1935, and May 29, 1935, requiring this plaintiff to prove the cost of producing and delivering the natural gas furnished by it to the defendant Portsmouth Gas Company be declared null and void and of no effect," and that The Commission and certain of the defendants, acting for it and on its behalf "be enjoined, inhibited and restrained from regulating or attempting to regulate the transactions between this plaintiff and the said

defendant Portsmouth Gas Company under the contract referred to herein, and that, pending the determination of its right to such permanent injunction, an interlocutory injunction be granted in accordance with the foregoing."

Plaintiff prayed also for a temporary restraining order and, on July 3, 1935, a temporary restraining order as prayed for was signed and issued by the late Hon. Benson W. Hough,<sup>1</sup> then United States District Judge for the Southern District of Ohio.

In its bill of complaint, plaintiff sets out several reasons upon any or all of which it claims it is entitled to the relief prayed for.

At the outset and primarily, however, it challenges the jurisdiction of The Commission, claiming that The Commission "is without any jurisdiction to make such orders or requirements of this plaintiff;" and "that the statute under which it is acting, giving it such power as construed by it, violates the commerce clause of the Constitution of the United States . . . ."

In their answer, filed July 30, 1935, The Commission and the other defendants named herein as acting for and in its behalf assert that The Commission does have jurisdiction; that the statute referred to is constitutional, and that the orders and directions of The Commission are in all respects proper and according to law.

On September 23, 1935, a stipulation, signed by counsel for the respective parties thereto, was filed, reading as follows: "It is stipulated by the parties hereto that the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, a copy of which is filed as Exhibit G with the bill, are the facts in regard to the natural gas and its movement pertinent to the consideration of the question involved in this case and the said findings of fact by the said The Public Utilities Commission

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<sup>1</sup> Subsequently, the cause came on for hearing and argument before a statutory three-judge court, of which Judge Hough was a member. Judge Hough died, however, before the case was decided necessitating a re-argument at a later date before the three-judge court, as now constituted.

may be treated by the Court as admissions of the parties in regard thereto . . . ."

On November 20, 1936, plaintiff filed an Amended Bill of Complaint and on March 8, 1939, its Second Amended and Supplemental Bill of Complaint, praying in each instance as in its original Bill.

On March 10, 1939, a Stipulation, signed by all the parties was filed herein, reading as follows: "It is hereby stipulated by the parties to this proceeding that the facts stated in the second amended bill of complaint herein are true and may be considered by the court as having been proven herein. This does not apply to Conclusions of Law."

On April 8, 1941, plaintiff filed a Third Amended and Supplemental Bill of Complaint reiterating therein the prayer of its original and Amended Bills.

On April 24, 1941, defendants, Public Utilities Commission of Ohio, George C. McConnaughey, Chairman of said Commission, Dennis F. Dunlavy and Harry M. Miller, members, Thomas J. Herbert, Attorney General of the State of Ohio and Kenneth L. Sater, Special Counsel for said Commission, filed a motion to dismiss the Third Amended Bill of Complaint for the reasons and on the grounds set forth in the motion. This motion was overruled on July 8, 1941.

On July 28, 1941, defendants filed an application for leave to file their answer to plaintiff's third amended and supplemental complaint. On August 4, 1941, leave was granted defendants so to do, and on the same day, to-wit: August 4, 1941, defendants filed their answer.

The cause is now before the Court on plaintiff's Third Amended and Supplemental Bill of Complaint; defendants' answer thereto (just referred to) and the record, including the Stipulation (above) of the parties as to the facts, which as alleged in the Third Amended Bill are in substance the same as stated in the Second Amended Bill (and in the original Bill and Amended Bill as well, except for a reference to the "National Gas Act" in the Second Amended Bill), except that it is recited in the Third Amended Complaint that the contract between plaintiff and defendant, Portsmouth Gas Company, referred to in the Second



Amended Complaint has been continued by the parties thereto "upon the same terms and conditions as provided by said last extension."

In their brief (pp. 5-6), counsel for The Commission and those defendants acting for it and on its behalf say "It may be conceded upon the basis of the record taken before The Commission that the transportation into the State of Ohio by pipe lines of gas produced by the Plaintiff in West Virginia and Kentucky is interstate commerce. It may be further conceded that the primary power to regulate the transportation of gas in interstate commerce rests with the Congress of the United States and that the Congress of the United States has not yet seen fit to exercise that power. It may be admitted further that if the mere fact that the transportation of such gas in interstate commerce precludes the state from exercising any jurisdiction thereover despite the fact that Congress has not seen fit to exercise its powers, and despite the fact that the exercise of such jurisdiction may be necessary in the interests of local regulation and despite any other facts which may be presented in a particular case, then The Public Utilities Commission of Ohio has no jurisdiction over the United Fuel Gas Company in the case that is here presented.

"On the other hand, if the interstate transportation of gas does not of itself preclude state regulation in a proper case where the nature of the regulation is primarily local in character, and where it is essential to the exercise of the regulatory functions of a public service commission, and where the particular facts of the case warrant the exercise of the power conferred by the legislative enactment in the state in question, and where Congress has failed to exercise its paramount authority, then the orders of The Public Utilities Commission of Ohio which are here sought to be enjoined may be sustained."

The sale and delivery of natural gas to the Portsmouth Gas Company is thus clearly interstate commerce, and compilation of voluminous data has been demanded for use in a proceeding by the State Commission to determine the fair and reasonable rate to be collected by the local distributing company with which the plaintiff has contracted to sell its product and services for a definite period at a definite price.



The two contracting parties are entirely separate and distinct from each other and are so operated. In view of such relationship and the nature of the inquiry before the Ohio Commission it is believed that the jurisdiction sought to be asserted falls outside the orbit of state regulation now permissible.

Since this suit was instituted, the Congress of the United States, to-wit, on June 21, 1938, passed an Act known as the "Natural Gas Act" entitled "An Act to regulate the transportation and sale of natural gas in interstate commerce, and for other purposes." Title 15, Sec. 717, U. S. C. A. c 556, Sec. 1, 52 Stat. 821. Among others, the Natural Gas Act contains the following provisions: "Section 1. (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

"Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission . . . shall be just and reasonable . . ."

"Sec. 5. (a) Whenever the Commission . . . shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company . . . subject to the jurisdiction of the Commission . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . ."

"Sec. 5. (b) The Commission upon its own motion, or upon the request of any State Commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natu-

ral-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas."

"Sec. 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

"(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction."

Natural Gas Pipe Line Co. v. Slattery, 302 U. S. 300, held a state statute which demands access to books and accounts of a pipe line company selling natural gas in interstate commerce and requires production of the information sought, to be not unconstitutional. That case involved a transaction between public utilities which were affiliates. Here the plaintiff and the defendant the Portsmouth Gas Company are conceded by the defendant Commission to have no connection with each other by way of interlocking directorates, unity of interest, or affiliation. They are entirely separate and distinct from each other and are so operated. Their dealings were and are at "arm's length." Cf. Natural Gas Pipe Line Co. v. Slattery, supra, at 306. This is an important distinction and completely differentiates the operation herein involved, from that held to be subject to examination in the Slattery case. However, it is not the sole differentiating feature between the two cases, for the Slattery case was decided prior to the enactment of the "Natural Gas Act," supra, the provisions of which, in our opinion, compel the issuance of the injunction prayed for.

Regardless of the right or jurisdiction of the Ohio Commission to issue the orders herein complained of on April 18, 1935, and May 29, 1935, it was deprived of any further jurisdiction by the passage of the Natural Gas Act on June 21, 1938. The transactions involved are squarely covered by the Natural Gas Act, constituting as they do

"the sale in interstate commerce of natural gas for resale for ultimate public consumption" (Sec. 1(b)). Under this statute the Public Utilities Commission of Ohio might have filed a complaint charging that the rates made by the United Fuel Gas Company in the sale of its gas to the Portsmouth Gas Company are unjust, unreasonable, or unduly discriminatory or preferential, and the Federal Commission thereupon would have been empowered to determine the just and reasonable contract rate to be thereafter observed and enforced. Section 5 (a). The Federal Power Commission is required to "make available" to the Ohio Commission such information and reports as may be of assistance in state regulation, and may upon request from the Ohio Commission make available as witnesses any of its own trained experts. Section 17 (c). We think that these provisions are significant.

Prior to the enactment of the Natural Gas Act it was permissible for the state to regulate local features of interstate commerce in gas. *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 29; *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465. Since the federal statute has been enacted, giving to the Federal Power Commission the power to fix the contract rate between plaintiff and the Portsmouth Gas Company, the Congress has occupied the field and the power is exclusive in the Federal Power Commission. The right to conduct investigations as to contracts for sale of gas in interstate commerce, which is an incident to the rate-making power, is also exclusively confided to the Federal Power Commission. We conclude that since the date of the passage of the Natural Gas Act the Ohio Commission and these defendants acting for it and on its behalf have been and are without legal right or authority to enforce the orders of the Commission entered April 18, 1935, and May 29, 1935.

Upon the record here the court finds, therefore, that an interlocutory injunction should be granted enjoining defendant, The Public Utilities Commission of Ohio and each and all other defendants herein acting for it or on its behalf from enforcing or seeking to enforce, or execute, the orders of the Commission entered by it on April 18, 1935, and May 29, 1935, against plaintiff herein.

The court adopts as its Findings of Fact herein, the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, to the extent and as set forth and referred to by the parties to the Stipulation filed herein on September 23, 1935.

Each party to pay its own costs.

Counsel may prepare and submit an order accordingly.

FLORENCE E. ALLEN,  
*Judge, U. S. Circuit Court of Appeals.*

ROBERT R. NEVIN,  
*Judge, U. S. District Court.*

MELL G. UNDERWOOD,  
*Judge, U. S. District Court.*

**Appearances:**

*For Plaintiff:* Harold A. Ritz, Charleston, W. Va.; Freeman T. Eagleston, Columbus, Ohio.

*For Defendant, The Public Utilities Commission of Ohio, et al.:* Hon. Thomas J. Herbert, Attorney General of Ohio; Kenneth L. Sater, Special Counsel for The Commission, Columbus, Ohio.

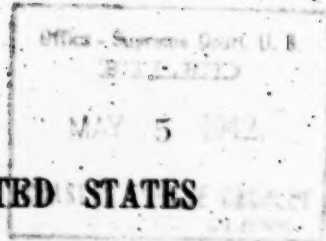
*For Defendant, The City of Portsmouth, Ohio:* W. L. Dickey, Portsmouth, Ohio.

*For Defendant, Portsmouth Gas Company:* John F. Beasley.





FILE COPY



**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1941**

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**No. 1216 87**

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**THE PUBLIC UTILITIES COMMISSION OF OHIO,  
GEORGE McCONNAUGHEY, CHAIRMAN OF SAID COM-  
MISSION, ET AL.,**

*Appellants,*

*vs.*

**UNITED FUEL GAS COMPANY, ET AL.**

---

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF OHIO.**

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**APPELLANT'S BRIEF IN OPPOSITION TO THE  
MOTION TO DISMISS OR AFFIRM.**

---

✓ **THOMAS J. HERBERT,**  
✓ **KENNETH L. SATER,**  
*Counsel for Appellants.*



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 1216

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PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,  
*Appellants,*

*vs.*

UNITED FUEL GAS COMPANY, ET AL.

---

**ANSWER BRIEF OF THE PUBLIC UTILITIES COMMISSION OF OHIO, ET AL., TO MOTION OF UNITED FUEL GAS COMPANY TO DISMISS THE APPEAL ALLOWED OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENT OF THE DISTRICT COURT.**

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The Portsmouth Gas Company distributes and, at all times mentioned, has distributed natural gas in the City of Portsmouth, Ohio. In February 1932, it appealed to appellant Commission from a two year rate ordinance enacted by the City of Portsmouth; this rate materially reduced the rate theretofore in effect. As a result of the hearings before it the Commission found on April 18, 1935 (Exhibit E attached to respondent United Fuel Gas Company's bill of complaint):

“That, therefore, the rates and charges fixed and prescribed by said ordinance are manifestly unjust,



unreasonable and insufficient to yield reasonable compensation for the service of said The Portsmouth Gas Company; ought not to be ratified or confirmed and that reasonable and just rates and charges should be substituted therefor."

At the same time it found:

"The Commission further finds that, in the absence of proof by the United Fuel Gas Company of a just and reasonable rate or charge to be maintained, imposed, charged and collected by it for the furnishing of natural gas to The Portsmouth Gas Company for distribution to consumers for public and private use in said City, it is unable to determine the just and reasonable rates to be substituted for the rates and charges fixed and prescribed by said ordinance which it has found herein to be unjust and unreasonable."

It then:

"Ordered, That the said United Fuel Gas Company be, and hereby it is notified, directed and required to proceed, forthwith, and with all diligence to prepare and, within ninety days from the date hereof, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio, in conformity to the provisions of the General Session Order of this Commission adopted and promulgated under date of March first, 1934. It is, further,

"Ordered, That this matter be continued for the receipt and consideration of such presentation by the United Fuel Gas Company and the making of such further and other order or orders herein as may be necessary and proper in the premises."

On May 29, 1935, it further found:

"That the gas being delivered to The Portsmouth Gas Company, and which has been delivered to it under

the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the States of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the State of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distribution system supplying the town of New Boston, in the State of Ohio, and the City of Ironton, in the State of Ohio, and that the distribution of natural gas in said town of New Boston and the said City of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company through a distribution system owned by said The United Fuel Gas Company; and

“That the United Fuel Gas Company and the Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company of either of said companies, The United Fuel Gas Company and The Portsmouth Gas Company, any such relation, but the two companies are entirely separate and distinct from each other and are so operated. . . .

“The Commission further finds that the furnishing of natural gas by the United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission.”

The Commission then denied a rehearing of its said order of April 18, 1935.

The pertinent portions of Section 614-2, Ohio General Code, on which these findings and orders are based are as follows:

**"614-2. Definitions.**—The following words and phrases used in this chapter unless the same is inconsistent with the text, shall be construed as follows:

• • • • •  
**"Any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:**

• • • • •  
**"When engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers within this state, is a natural gas company, or when engaged in the business of supplying natural gas to gas companies or to natural gas companies within this state, is a natural gas company; provided that a producer supplying to one or more gas, or natural gas companies, only such gas as shall be produced by such producer from wells drilled on land owned in fee by such producer or where the principal use of such land by said producer is other than the production of gas, within this state, shall not thereby become a natural gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas company providing for the supply of natural gas and for compensation for the same, shall be subject to the jurisdiction of the commission whether or not such rates, rentals, tolls, schedules, charges or agreements shall have been agreed upon or put into effect prior to the taking effect of this provision; provided, however, that authority be and hereby is granted to the public utilities commission of Ohio, upon ap-**

plication made to it, to relieve any producer of natural gas, hereinbefore defined as a gas company or a natural gas company, of compliance with the obligations imposed by this chapter, so long as such producer be not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as such producer does not engage in the distribution of natural gas to consumers; . . . ."

Four matters we call to the attention of the Court:

1. The above are not findings of interstate commerce. They are findings of jurisdiction under a state statute; continuous flow of gas as found is not necessarily the same as unreduced pressure flow as found in *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, 75 L. Ed. 1171, 51 S. Ct. Rep. 499, cited by respondent. None of the authorities cited by respondent refer to a situation wherein a company retails gas in one city and wholesales gas to an adjoining and contiguous city from the same line and at the same time. No authority of this or any other court of last resort can be found dealing with such a factual situation; it is both novel and, to date, unique.

2. The answer of these appellants to the bill of complaint in the court below specifically denies the interstate character of the transactions between the respondent and the Portsmouth Gas Company.

3. By adopting these findings quoted above in its decision on October 2, 1941, the court below automatically found that appellant Commission has jurisdiction to issue and execute the orders in question; the transaction, consequently, had to be intrastate and within the jurisdiction of such Commission because both it and the court below have now so found.

4. Even if we assume, for the purpose of argument, that the transactions in question were in interstate commerce, the orders quoted above and appealed from do not, of themselves, regulate interstate commerce. They constitute, so far, nothing more than an inquiry as to the basis for a theretofor unknown arrangement and there is nothing in the record to indicate that appellant Commission will change the rates between respondent and the Portsmouth Gas Company even when the orders in question are complied with by respondent. Respondent is in the position corresponding to that held by the gas company in *East Ohio Gas Company v. Federal Power Commission*, 115 F. (2d) 385. Something further must be done by appellant Commission before an appeal lies.

As to the Federal Natural Gas Act, it was not passed until June 1938. The ordinance period in question expired in February 1934. Obviously that Act can have no bearing on this case or on the proceedings before appellant Commission. Had there not been an unavoidable delay in the trial of the case below, this matter would have been terminated long before the Natural Gas Act was ever passed.

Appellant Commission requests permission of this Court to ask why appellee United Fuel Gas Company charges the Portsmouth Gas Company, a stranger dealing at arm's length, 37 cents per M c. f. for gas and the Ohio Fuel Gas Company, an affiliate, at the same time, 25 cents per M c. f. See *Columbus Gas and Fuel Co. v. Pub. Util. Comm.*, 292 U. S. 398.

Respectfully submitted,

THOMAS J. HERBERT,  
KENNETH L. SATER,  
Attorneys for Appellants.







IN THE  
**Supreme Court of the United States**

No. 87.

**OCTOBER TERM, 1942.**

THE PUBLIC UTILITIES COMMISSION OF OHIO,  
GEORGE McCONNAUGHEY, CHAIRMAN, DEN-  
NIS F. DUNLAVY AND HARRY M. MILLER,  
MEMBERS OF THE PUBLIC UTILITIES COM-  
MISSION OF OHIO, THOMAS J. HERBERT,  
ATTORNEY GENERAL OF OHIO, AND KEN-  
NETH L. SATER, SPECIAL COUNSEL FOR THE  
PUBLIC UTILITIES COMMISSION OF OHIO,

Appellants,

vs.

THE UNITED FUEL GAS COMPANY, THE PORTS-  
MOUTH GAS COMPANY AND THE CITY OF  
PORTSMOUTH, OHIO,

Appellees.

**BRIEF OF APPELLANTS.**

✓ THOMAS J. HERBERT,  
✓ Attorney General of Ohio,  
KENNETH L. SATER,

Special Counsel for The Public Utilities Commission  
of Ohio,

Counsel for Appellants.



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**IN THE**  
**Supreme Court of the United States**

**No. 87.**

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**OCTOBER TERM, 1942.**

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**THE PUBLIC UTILITIES COMMISSION OF OHIO,  
GEORGE McCONNAUGHEY, CHAIRMAN, DEN-  
NIS F. DUNLAVY AND HARRY M. MILLER,  
MEMBERS OF THE PUBLIC UTILITIES COM-  
MISSION OF OHIO, THOMAS J. HERBERT,  
ATTORNEY GENERAL OF OHIO, AND KEN-  
NETH L. SATER, SPECIAL COUNSEL FOR THE  
PUBLIC UTILITIES COMMISSION OF OHIO,**

**Appellants,**

**vs.**

**THE UNITED FUEL GAS COMPANY, THE PORTS-  
MOUTH GAS COMPANY AND THE CITY OF  
PORTSMOUTH, OHIO,**

**Appellees.**

---

**BRIEF OF APPELLANTS.**

In the course of a gas rate case then pending before it,  
and for the purpose of enabling it to determine a just

and reasonable distribution rate therein, The Public Utilities Commission of Ohio, on April 18, 1935 and May 29, 1935 issued two orders directly involving appellee, United Fuel Gas Company, which company had theretofore not been an active party in such proceedings. These orders appear respectively as Appendix 1 and Appendix 2 attached to the end of this brief. These proceedings in which the said two orders were issued, were held pursuant to Sections 614-44 to 614-46, both inclusive of the Ohio General Code; these and the other relevant statutes appear in Appendix 3 to this brief.

Claiming that the orders in question interfere with interstate commerce, impair the obligation of its contract, deprive it of due process of law, and, later, conflict with the provisions of the Federal Natural Gas Act (June 21, 1938, c. 556, 52 Stat. 821 et seq.; U. S. C. A. Tit. 15, ch. 15B, sec. 717 et seq.), appellee United Fuel Gas Company, sought and obtained interlocutory and permanent injunctive relief against the enforcement of such orders from a statutory three-judge court sitting in the United States District Court for the Southern District of Ohio, Eastern Division. The opinion and order of that court are not yet reported but appear as Appendix 4 and Appendix 5, respectively, to this brief.

This appeal from that opinion and order is based on Section 238 of the Judicial Code (March 3, 1911, c. 231, sec. 238, 36 Stat. 1156 as amended; U. S. C. A. Tit. 28, sec. 345) and Section 266 of the Judicial Code (June 18, 1910, c. 309, sec. 17, 36 Stat., 557 as amended; U. S. C. A., Tit. 28, sec. 380). A statement as to jurisdiction has been duly filed herein and probable jurisdiction was noted by the Court on June 1, 1942.

### STATEMENT OF FACTS.

For some time prior to 1932 and at all times since then, The Portsmouth Gas Company, a corporation organized and existing under the laws of the state of Ohio with its office and principal place of business in the city of Portsmouth, Ohio, has been selling and distributing natural gas to consumers in that city. That company and that city are both parties appellee herein. The Portsmouth Gas Company is not a producer of gas and has no available gas supply of its own. The gas which it has been so selling and distributing is purchased by it from appellee, United Fuel Gas Company (hereinafter referred to as United Fuel), a corporation organized and existing under the laws of the state of West Virginia of which state it is a citizen and resident.

United Fuel produces and purchases in West Virginia and Kentucky the gas which it has been selling both to the Portsmouth Gas Company and to the other customers and consumers hereinafter mentioned and described. The gas so purchased and produced by United Fuel is conveyed by it in a continuous flow, through a pipe line owned by it, from the points of its production in West Virginia and Kentucky to a point in the state of Ohio where it is delivered to the Portsmouth Gas Company. A substantial part of that gas so purchased and produced and flowing through the same line is utilized by United Fuel for retail sales by it to domestic customers and consumers in the town of New Boston, Ohio, and in the city of Ironton, Ohio, in which communities United Fuel also owns and operates the distribution systems



there in use. Both New Boston and Iron-ton are closer than the city of Portsmouth and the Portsmouth Gas Company to the induction end of United Fuel's said pipe line. Insofar as the record shows, there is no intercorporate affiliation as that phrase is ordinarily used between United Fuel and the Portsmouth Gas Company either by way of interlocking directorates or otherwise, and it has been herein so found.

Effective as of November 1, 1931, United Fuel and the Portsmouth Gas Company entered into a five-year contract for the sale and delivery of natural gas by United Fuel to the Portsmouth Gas Company at the price of 37 cents for each one thousand cubic feet (M c. f.). The contract also provided: (1) that the obligation of United Fuel to deliver gas thereunder should be subordinate to all previous obligations assumed by it to furnish natural gas to others, including the Ohio Fuel Supply Company (now merged with the Ohio Fuel Gas Company), the city of Cincinnati, the Central Kentucky Natural Gas Company, the Louisville Gas and Electric Company, the Hope Natural Gas Company, the Pittsburgh and West Virginia Gas Company and the Warfield Natural Gas Company; and (2), that the Portsmouth Gas Company agreed not to hold United Fuel liable for any failure in the supply of gas under the contract if United Fuel shall have used due diligence to prevent such failure. Since the date of its original expiration this contract has been renewed at various times and its schedule of rates has now been filed by United Fuel with the Federal Power Commission since the passage of the federal Natural Gas Act. The entire contract is set forth on pages 12-16 of the record herein.

On February 24, 1932, the council of the city of Portsmouth passed an ordinance prescribing for the balance of the period of the franchise to the Portsmouth Gas Company (two years) the maximum rates for furnishing natural gas to the consumers, and in the public grounds and buildings of the city of Portsmouth. The rate so established was 45 cents per M c. f. whereas the rate theretofore in effect had averaged about 65 cents per M c. f. Pursuant to Sections 614-44 et seq., Ohio General Code, the Portsmouth Gas Company made complaint and appealed from such ordinance to appellant, The Public Utilities Commission of Ohio (hereinafter referred to as the commission), and, during the pendency of its complaint and appeal, elected to charge under bond duly filed the schedule of rates in effect immediately prior to the effective date of the ordinance which said rates it has now collected for more than ten years even though the ordinance in question expired eight years ago last February. As the hearings progressed, the commission's order of June 18, 1934 made United Fuel a party to the proceeding before the commission and directed it to file with the commission a copy of its contract with the Portsmouth Gas Company whereunder it was then, as above stated, selling natural gas to the Portsmouth Gas Company for distribution in the city of Portsmouth; no appeal was taken from that order.

The commission's finding and order appearing at Appendix I attached hereto shows that on April 18, 1935, the commission found the rates and charges fixed by the ordinance in question to be manifestly unjust, unreasonable and insufficient to yield a reasonable compensation to the Portsmouth Gas Company, that such rates and charges should not be ratified or confirmed and that pur-

suant to Section 614-46, Ohio General Code, the commission should substitute reasonable and just rates and charges therefor. At the same time the commission found that the furnishing of natural gas by United Fuel to the Portsmouth Gas Company, as described above, was a public utility service within the meaning of Section 614-2, Ohio General Code, and that the rates charged therefor were subject to the jurisdiction of the commission. The commission further found that it was unable to determine the just and reasonable rates and charges to be substituted for those fixed by the ordinance unless it had proof from United Fuel of a just and reasonable rate to be charged by it for the furnishing of natural gas to the Portsmouth Gas Company. The commission consequently ordered United Fuel to prepare and present all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by United Fuel to the Portsmouth Gas Company for natural gas so furnished for distribution within the city of Portsmouth.

On application of United Fuel and by stipulation of the parties to the proceeding before the commission, there was made the commission order of May 29, 1935 which appears as Appendix 2 attached hereto; this order enlarged somewhat on the findings contained in the commission's previous order of April 18, 1935, described and referred to just above, but left untouched the earlier instructions to United Fuel relative to the production of testimony and exhibits.

On July 3, 1935, United Fuel filed its bill of complaint in the United States District Court for the Southern District of Ohio, Eastern Division, praying that interlocutory and permanent restraining orders issue enjoining appellants herein both from enforcing the two above

described orders of the commission dated April 18, 1935 and May 29, 1935 and from regulating or attempting to regulate the transactions between United Fuel and Portsmouth Gas Company under the contract also described above. Some relief was sought against the city of Portsmouth but none against the Portsmouth Gas Company. Answers were filed by all parties in the lower court and a stipulation entered into to the effect that the findings of fact in the commission's order of May 29, 1935 might be treated as admissions by the parties thereto with regard to the natural gas and its movement pertinent to the consideration of the question involved; it was also stipulated that it would cost United Fuel more than \$3,000.00 to comply with the commission's two said orders. Thereafter, the record shows, three amended and supplemental bills of complaint were filed by United Fuel and two supplemental answers by these appellants.

So made up, the case was decided by a statutory three-judge court (Allen, P. J., Nevin and Underwood, J. J.), which handed down its opinion on October 2, 1941, and on January 16, 1942, granted an order and decree temporarily and permanently enjoining and restraining appellants herein from enforcing and executing the two said orders of the commission. From that order and decree this appeal was duly taken.

### **SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.**

On this appeal appellants will urge all of their assigned errors.

## SUMMARY OF ARGUMENT.

Appellants' argument that it has at all times had jurisdiction to issue and execute its two orders of April 18, 1935, and May 29, 1935, is based on the four points with their subdivisions as follows:

I. The transactions between United Fuel and the Portsmouth Gas Company do not constitute interstate commerce either factually or legally.

A. The absence of interstate commerce from the factual point of view is illustrated by three matters.

(1) The movement of gas in United Fuel's line.

(2) United Fuel's pleadings before the appellant commission.

(3) The effect of United Fuel's contract with the Portsmouth Gas Company.

B. Interstate commerce from the legal point of view does not exist.

(1) The decisions of this court considered as to their facts.

(2) The decisions of this court considered in their chronological order.

(3) The law of interstate commerce generally.

II. At no time in the proceedings before the commission was United Fuel denied due process of law.

III. The two said orders of the commission have not impaired either the contract between United Fuel and the Portsmouth Gas Company or any continuation thereof to date.

IV. The Federal Natural Gas Act has no bearing at all on the case at bar.



## ARGUMENT.

### I.

#### **THE TRANSACTIONS BETWEEN UNITED FUEL AND THE PORTSMOUTH GAS COMPANY DO NOT CONSTITUTE INTERSTATE COMMERCE EITHER FACTUALLY OR LEGALLY.**

(Assignments of Error, Nos. 1, 2, 3, 4, 9, 10, 11, 12, 13, 14.)

Particularly in the matter of its decision on the question of interstate commerce did the District Court disregard two principles recognized by this court. One of these principles is that there can not be recognized a vested right to do a manifest wrong. See *Pearsall v. Great Northern Railway*, 161 U. S., 646, 675; see also, *Foster v. Essex Bank*, 16 Mass., 245, 273, 8 Am. Dec., 135, 139. The other is this court's interpretation of the principle of arm's length bargaining. Let us consider how these two principles apply to the case at bar.

#### **A. The Absence of Interstate Commerce from the Factual Point of View Is Illustrated by Three Matters.**

##### *(1) The Movement of the Gas in United Fuel's Line.*

The Portsmouth Gas Company is a local distribution company located in and serving only the city of Portsmouth, Ohio. It is an Ohio corporation and the record does not show that it is qualified to do business or is doing business in any other locality or state. United Fuel is a West Virginia company and has its principal

place of business in that state. It produces, transmits, sells and distributes natural gas in West Virginia and transmits, sells, and distributes natural gas both wholesale and retail in Ohio; its activities in other states are not disclosed but the contract attached to its bill of complaint indicates that its dealings with other companies take it up to, if not into, both Kentucky and Pennsylvania. Both commission and District Court found that these two companies are not affiliated by way of interlocking directorates, unity of stock interest, parent holding company or otherwise.

On the basis of the foregoing, the District Court held that when two such companies agree by contract for a supply of gas which is to be produced or purchased by one company in West Virginia and Kentucky and transmitted by it to a point in Ohio for delivery to the other party and which is to be paid for by the other party on the basis of a stipulated purchase price, that contract and that transaction based thereon constitute interstate commerce; and there being no intercorporate affiliation between those parties, as was the situation in *United Fuel Gas Company v. Kentucky Railroad Commission*, 218 U. S., 300, the Ohio commission has no power of regulation in the premises.

Any such conclusion, we submit, is under the circumstances of the case at bar a tacit recognition of a vested right to do a manifest wrong under the guise of interstate commerce and is also a complete misconception of the meaning and purpose of the principle of arm's length bargaining. In the first place it fails to recognize the District Court's own finding of fact that out of the same pipe line used by United Fuel to deliver gas to the Portsmouth Gas Company, United Fuel has also been dis-

tributing gas in New Boston and Ironton, Ohio. In the second place, it also fails to recognize that United Fuel's distribution system in New Boston is closer to United Fuel's West Virginia source of supply than is Portsmouth and that its Ironton distribution system is even closer than is New Boston. In the third place, neither commission nor District Court found that "continuous flow from said points of production in West Virginia and Kentucky to a point in Ohio" is the same thing or even approximately the same thing as the unreduced pressure flow which was discussed in *East Ohio Gas Company v. Ohio Tax Commission*, 283 U. S., 465. The implication of the findings by commission and District Court is exactly the opposite.

Of course, the flow of gas in the case at bar was continuous. As the Hope Natural Gas Company pumps gas clear across the state of Ohio to the distribution company in the East Ohio case, cited just above, so does United Fuel pump a smaller volume of gas a much shorter distance in the case at bar. But continuous flow is not the controlling point. The point is that United Fuel was retailing gas in Ironton and New Boston from the same line that it used to deliver gas to the Portsmouth Gas Company and that it must have been so retailing its gas before any of the volume in its line was delivered to the Portsmouth Gas Company. It is perfectly obvious from these facts not only that the pressure was reduced in United Fuel's line but also that the pressure was reduced before any gas was delivered by it to the Portsmouth Gas Company.

When a shipper-vendor starts on its way a volume of gas sufficient in size to serve three communities and then en route diverts from that total volume enough gas to

serve two of the three communities before the balance of its wares reaches the third community there is bound to be a reduction in pressure after the diversions are made just as distinctly, if not just as greatly, as there was in the East Ohio case. That is just as obvious as is the fact that the pressure in an attic water faucet goes down when faucets on the first and second floors are in use.

In both the East Ohio case and the case at bar the flow of West Virginia gas was continuous but it was reduction in pressure rather than continuity of flow which resulted in the decision in the former case. In the East Ohio case the court found that there was a given volume of gas definitely earmarked for one purchaser only, delivered at unreduced pressure with no intervening sales at all, either wholesale or retail, between the point of departure in West Virginia and the Cleveland city gate. There the pressure was reduced although the flow continued and there the interstate movement ended. But in the case at bar there can be no earmarking because there are many buyers both retail and wholesale and the retail buyers are reached by United Fuel before it makes delivery to the Portsmouth Gas Company. This results in reduced pressure before the Portsmouth gate is ever reached. Cleveland was the gate in the East Ohio case, Iron-ton in the case at bar; at each point the package was equally broken.

This difference between continuous flow and reduced pressure is amply borne out by United Fuel's application for rehearing of the commission's order of April 18, 1935 (Exhibit F to its original bill of complaint, Record, 35). Therein United Fuel asked for findings by the commission that its West Virginia and Kentucky product moved "by constant flow through pipe lines, from the

said states of West Virginia and Kentucky into the state of Ohio" where it is delivered to the Portsmouth Gas Company. Never a word was said about unreduced pressure flow although the East Ohio case was at that time five years off the press. United Fuel obviously must not have asked for a finding of unreduced pressure because it could not substantiate such a request; nor did either commission or District Court so find and this distinction, we submit, displays clearly that in the case at bar the interstate movement ended at Ironton, Ohio, and not much later at Portsmouth.

When a vendor of gas comes into a state and by distributing gas, regardless of the point of production thereof, clearly subjects itself to the jurisdiction of the regulatory body of that state, it may not regain the aegis of interstate commerce simply by projecting farther into that state some of the facilities which first brought it under that state's jurisdiction and thereby opening to itself more extensive fields of operation. Such a vendor is not an interstate carrier as was the Hope Natural Gas Company in the East Ohio case; it is more like a peddler offering its wares up to the limit of its capacity to whomsoever will buy and, as such, is fully and completely subject to the jurisdiction of the state regulatory body. That is the situation in which United Fuel finds itself in the case at bar; it is clearly subject to the jurisdiction of appellant commission.

*(2) United Fuel's Pleadings Before the Appellant Commission.*

In addition there is another factual matter which the District Court overlooked. It is United Fuel's admission, unexpressed but nonetheless implicit in its application



for a rehearing of the commission's order of April 18, 1935 referred to above, that it is amenable to the jurisdiction of the commission and that the two orders of April 18, 1935, and May 29, 1935, are properly within the jurisdiction of that commission. The sixth paragraph of that application reads as follows:

"The undersigned petitioner controverts the right of The Public Utilities Commission of Ohio to prescribe the rate at which petitioner shall furnish gas to the Portsmouth Gas Company under the contract which it has with said company, for the reasons heretofore stated in its answer herein. It does not question the right of said commission to call upon this petitioner for such evidence and facts as may be in its possession which may show or tend to show what would be a reasonable rate to be charged for gas to the consumers in the city of Portsmouth, and it offers to furnish to the commission such facts and evidence as may be desired, or to permit any officers or agents of The Public Utilities Commission of Ohio to ascertain such facts and evidence as may be desired from its records and books for the purpose aforesaid, but denies and protests the right or power of said commission to fix the rates at which petitioner shall sell the gas which it transports into the state of Ohio and delivers to the Portsmouth Gas Company."

It is common knowledge that consumers' gas rates, like consumers' power and water rates, are composed of three elements of cost (production, transmission and distribution), two of which are represented in the case at bar by the contract rate between United Fuel and the Portsmouth Gas Company. The commission's two disputed orders disposed of the third element of cost and then found that the ultimate distribution rate could not be determined without the presentation of certain evidence by United Fuel relating to the other costs.

In its application United Fuel denies the power of appellant commission to consider or review any of the con-

tractual rates charged by it in supplying the Portsmouth Gas Company but then turns directly around and offers to produce any evidence that it may have showing or tending to show what would be a reasonable distribution rate for the city of Portsmouth, which distribution rate is composed at least one-half of United Fuel's charges to the Portsmouth Gas Company. That offer, appellant commission points out, is acceptable to the commission not only as a tender of evidence and records, but also as an admission of subjection to the jurisdiction of appellant commission. United Fuel's general denial is, we suggest, controlled by its express tender.

*(3) The Effect of United Fuel's Contract With the Portsmouth Gas Company.*

The last consideration of the factual phase of the allegations of interstate commerce could be discussed with propriety under the subsequent heading of impairment of contractual obligations, but since the District Court treated it chiefly under the heading of interstate commerce it will be correspondingly treated herein. It deals entirely with that elusive phrase "arm's length bargaining" which apparently had its origin in legislative investigation and has since received judicial recognition by this court in *Western Distributing Company v. Kansas Public Service Commission*, 285 U. S., 119, 127, by the District Court in the case at bar, and by possibly a few other decisions.

Twelve to fourteen years ago that phrase arose in the course of an investigation of dealings between affiliated companies and their parent organizations. It was used to describe a situation wherein no financial advantage could be traced or laid to dealings wherein parties were

so associated by interlocking directorates, stock control or other connection, that the effect of their dealings might not be to the best interest of the public, of some part thereof, or of their own shareholders. In its original conception this phrase was linked only with improper use of intercorporate connections, and is best illustrated by the assumption that when parties to a transaction are affiliated or subject to a common control there is an absence of arm's length bargaining between them. It originally had no connection with or reference to dealings between unaffiliated or unconnected parties even though one or both were engaged in a field of business activity lending itself to monopolistic control; and as a result, there has arisen in the case at bar a factual situation wherein the District Court's use of that phrase in its original sense has caused it to be turned back on itself to the detriment of those whom it was designed to protect, the ultimate consumers of a utility service.

There is every reason to subscribe to a doctrine of arm's length bargaining particularly if there is a general and open market and if there are the safeguards of bargaining and competition to protect that market and that dealing. The theory is excellent but the theory alone is not sufficient because a purchaser's power to bargain and a purchaser's power to enter the open market presuppose the existence of such a market and a choice among sellers. It is therein that the District Court completely overlooked the various tests of arm's length bargaining in an open market laid down in *Natural Gas Pipe Line Company v. Slattery*, 302 U. S., 300, 308.

The District Court, as seen from its unreported decision herein, based its judgment and decree entirely on the fact that United Fuel and the Portsmouth Gas Com-

pany, as found by the commission, were unaffiliated parties; hence, arm's length bargaining existed between them. This ignores and nullifies this court's statement in the Slattery case that: "The price itself may be found to be so exorbitant as to persuade that the bargaining was not at arm's length," which is the only sentence in that entire opinion justifying the use of the Slattery case as a guide to the deciding of the case at bar. It also ignores the result of all of the other facts of the case at bar.

Let us assume with the District Court that there was an arm's length contract between United Fuel and the Portsmouth Gas Company since they were not corporate affiliates and see to what absurd conclusions it leads us, bearing always in mind that the contract relates to a two-year ordinance period beginning in February 1932, within which period the question is not one of conflict between state and federal regulation but one of either state regulation or no regulation at all. Let it also be borne in mind that United Fuel retails and wholesales from the same line. This contract appears as Exhibit A to United Fuel's original bill of complaint (Record, 12). Three points arise in connection with it.

(1) In the Western Distributing Company case, supra (285 U. S., 119), this court had under consideration a distribution rate for the city of Eldorado, Kansas. The carrier and distributor were affiliates. In discussing the duty of the carrier to furnish evidence of operating costs to the state commission as an aid in the determination of a reasonable distribution rate, this court held that that state commission was entitled to such information "although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition."

In the case at bar the District Court stated in the second paragraph of its opinion that "the Portsmouth Gas Company is not a producer of natural gas and has no available gas of its own." We point out not only that no general and open market under such circumstances is or ever has been available to the Portsmouth Gas Company but also that no usual safeguards of bargaining and competition are or ever have been open to it. This is not only true because of the inherently monopolistic nature of a business in a natural resource, but also because the Natural Gas Act now tends to emphasize that monopoly by its requirement of a certificate of convenience and necessity prior to the extension of a pipe line or other gas facility. But regardless of the Natural Gas Act, no company, we submit, will extend, or seek to extend its lines so that it could sell to a distributor in a city no larger than Portsmouth, Ohio, with United Fuel already in the field. The qualification which this court laid down in the Western Distributing Company case was never fulfilled in the case at bar.

(2) Let us consider this arm's length contract in more detail. It calls for a charge of 37 cents per M c. f. for gas transmitted "to a point in the state of Ohio where it is delivered to the Portsmouth Gas Company." While that contract and its various renewals were going on, United Fuel was also selling gas at the Ohio River to the Ohio Fuel Supply Company, which later became a part of the Ohio Fuel Gas Company, an affiliate. The Ohio Fuel Supply Company and later the Ohio Fuel Gas Company transmitted the gas received from United Fuel at the Ohio River to the city of Columbus, Ohio, where it was sold to and distributed by the Federal Gas Company and the Columbus Gas and Fuel Company, now consolidated



with the Ohio Fuel Gas Company. See: *Re Columbus Gas and Fuel Company*, P. U. R. 1933A, 337, 342-343, and *Columbus Gas and Fuel Company v. City of Columbus*, 32 P. U. R. (N. S.), 321, 330.

Rate litigation arose in the city of Columbus concerning the ordinance periods 1929 to 1934 and 1934 to 1939. In both of these cases the question arose as to the amount to be considered a proper allowance for the distribution company in the city of Columbus to pay United Fuel either directly or through a carrier company for natural gas delivered by United Fuel at the Ohio River. This is, we point out, exactly what the Portsmouth Gas Company is doing in the case at bar except the companies herein are said to be dealing "at arm's length" while those in the Columbus cases were not.

The river rate in the former Columbus case was set at 22.04 cents per M c. f. See 1932 Annual Reports of the Public Utilities Commission, 54, also reported in P. U. R. 1933A, 337, 367, *supra*, and on appeal of the same case, *Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio*, 127 O. S., 109, 116, 187 N. E., 7; *Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio*, 292 U. S., 398, 408. In the second Columbus case the rate was set at 22.03 cents per M c. f. See 1939 Annual Reports Public Utilities Commission of Ohio, 20, 173, 32 P. U. R. n. s., 321, 369, 384, *supra*. The distribution rate in this latter case was twice appealed to the Supreme Court of Ohio but in neither instance was the river rate changed. *Ohio Fuel Gas Company v. Public Utilities Commission of Ohio*, 138 O. S., 483, 35 N. E. (2nd), 829, and *Ohio Fuel Gas Company v. Public Utilities Commission of Ohio*, 139 O. S., 581, 41 N. E. (2nd), 389.

We respectfully submit that if a vendor may deal with a stranger for 37 cents per M c. f. and at the same time deal with an affiliate at an average of 22.035 cents, the doctrine of arm's length bargaining needs overhauling. If not rectified, the decision of the District Court in the case at bar results in the recognition of a vested right to do a manifest wrong.

(3) But now let us consider once again this arm's length contract calling for 37 cents per M c. f. and let us consider what the Portsmouth Gas Company obtained for that price. It received a contract the second and sixth articles of which read as follows:

"Second: It is agreed, however, that the obligation of the United Fuel Company at any time to furnish and deliver gas under this contract shall be subordinate to all previous obligations assumed by it to furnish natural gas to others, including the following:

(a) Supplying consumers connected at any time directly to its distributing systems in West Virginia and Ohio;

(b) The performance of a contract for the sale of gas to the Ohio Fuel Supply Company, under which it is now delivering gas to said company;

(c) The performance of a contract for the sale of gas for use in the city of Cincinnati and in the Cincinnati district, under which contract it is now delivering gas for that purpose;

(d) The performance of a contract for the sale of gas to the Central Kentucky Natural Gas Company, dated November 1, 1912;

(e) The performance of a contract for the delivery of gas to the Louisville Gas & Electric Company dated July 5, 1913, as modified;

(f) The performance of a contract for the sale of gas to the Hope Natural Gas Company, dated August 25, 1916, as modified;

(g) The performance of a contract for the delivery of gas to the Pittsburgh & West Virginia Gas Company at Cedarville, in exchange for gas delivered by said company to the United Fuel Company.

(h) The performance of a contract for the sale of gas to the Warfield Natural Gas Company, dated the twenty-eighth day of June, 1923."

"Sixth: The said Portsmouth Company agrees that it will not hold the United Fuel Company liable for any failure in the supply of gas under this contract, provided the said United Fuel Company has used due diligence to prevent such failure."

We do not know from the record what price United Fuel was obtaining from any of its seven or more prior obligees but we do know that Ohio Fuel Supply Company and its successors were paying 22.035 cents per M c. f. for the same product which United Fuel was selling to the Portsmouth Gas Company for 37 cents per M c. f. We do know, however, that a purchaser is presumed to get what he pays for if that purchaser is dealing (so found) at arm's length in what is said to be a general and open market subject to the usual safeguards of bargaining and competition. In the ordinary course of business dealings it is anomalous that a preferred obligee should pay materially less than the one who brings up the tail end of the procession; it is more logical to assume that the higher the price the greater the priority to the supply.

Yet here is a purchaser said to be dealing at arm's length in an open market and admittedly paying 37 cents for the same product which one not dealing at arm's length was obtaining for fifty per cent less; and all that the former acquired for its added premium of fifty per cent in the case at bar was an agreement not to hold the

vendor liable for a failure in supply, if the vendor's prior obligations assumed at lower prices, in one instance at least, with a corporate affiliate consumed more of its product than was in "due diligence" to be expected. (For the affiliation of four of the purchasers named in United Fuel's said contract, see *In the Matter of Columbia Gas & Electric Corporation*, 8 S. E. C., 443, 450.) It is idle to say in such a situation that if the purchaser is dissatisfied with the price it is paying, it is free to go into the general and open market. There is no such market in the case at bar either in 1932, 1933, 1934 or even 1942. We deny the existence of both a general, open market and the usual safeguards of bargaining and competition in such a situation. If the domestic consumers of gas in Portsmouth are to be subordinated to cheaper priorities in the hands of some one or more affiliates with no power in appellant commission to make due inquiry, arm's length bargaining has become a mockery which none may remedy if this appeal is denied; yet the hurdle of these three illustrations was taken by the District Court in stride.

The constitutional safeguards around interstate commerce and the inauguration of the doctrine of arm's length bargaining were equally intended to furnish protection through the contracting parties to their ultimate consumer-beneficiaries. They were never intended and should never be twisted into furnishing a shield behind which one or both of two contracting parties might even seem to hide for themselves unexplained charges from the scrutiny of the only available guardian of public interest. It is obvious, however, in the case at bar that the District Court's rejection of (then) Mr. Justice

Stone's test of exorbitant price in the *Slattery* case, *supra* (302 U. S., 300), will cause the doctrine of arm's length bargaining, like a whip, to backlash as injuriously against the gas consumers of Portsmouth Ohio, as it acts beneficially in such usual cases as that of the gas consumers of New Boston, Ironton and Columbus, Ohio. For the first time since the origin of the phrase, arm's length bargaining, we are confronted with such a situation that only by the use of the price test may there be continued the assurance of the protection for which that phrase was created. The District Court erred materially when it failed to apply that test.

Now let us turn to the law, bearing constantly in mind that appellants make no concession that the transactions of United Fuel in Ohio constitute interstate commerce; the following discussion is made only because the issues were raised either by United Fuel's bills of complaint or by the District Court's opinion.

### **B. Interstate Commerce from the Legal Point of View Does Not Exist:**

When the leading decisions of this court in cases involving the movement of gas from one state to another are examined, it is found that never before has this court been confronted with such a situation as we find in the case at bar wherein the interstate carrier has been selling gas both wholesale and retail from the same line at the same time and in contiguous communities. Moreover, when those cases are then taken in chronological sequence, it is seen that it was only in the earlier decisions that state regulation was held to the ineffectual minimum indicated by the decision of the District Court



herein. Let us consider the ten following cases each of which is followed by the date of its decision in this court:

- Kansas Public Utilities Commission v. Landon, Receiver, 249 U. S., 236, 245 (March 17, 1919);
- Pennsylvania Gas Company v. Public Service Commission, etc., 252 U. S., 23, 29-30 (March 1, 1920);
- Commonwealth of Pennsylvania v. State of West Virginia, 262 U. S., 553, 596-597. (June 11, 1923);
- State of Missouri ex rel. Barrett v. Kansas Natural Gas Company, 265 U. S., 298 (May 26, 1924);
- People's Natural Gas Company v. Pennsylvania Public Service Commission, 270 U. S., 550 (April 12, 1926);
- Rhode Island Public Utilities Commission v. Attleboro Steam and E. Co., 273 U. S., 83 (January 3, 1927);
- United Fuel Gas Company v. Kentucky Railroad Commission, supra, 278 U. S., 300, 309 (January 2, 1929);
- East Ohio Gas Company v. Ohio Tax Commission, supra, 283 U. S., 465 (May 18, 1931);
- Western Distributing Company v. Kansas Public Service Commission, supra, 285 U. S., 119 (February 29, 1932);
- Natural Gas Pipe Line Company v. Slattery, 302 U. S., 300, supra (December 6, 1937).

(1) *The Decisions of This Court Considered as to Their Facts.*

The three cases which seem to stand out most strongly against appellant commission are the Landon case, the Barrett case and the Attleboro case, but the first two of these decisions specifically pointed out that there was no intercorporate relationship between the interstate carrier and the local distribution companies, and the same situation is found in the Attleboro case. Moreover, in those three cases there was no distribution activity such as that engaged in by United Fuel in the case at bar. The

interstate carrier in those cases dealt only in wholesale volumes of its product; and of course, in such event, the transaction would be interstate commerce.<sup>3</sup> Also in the Landon case this court spoke only of "unreasonable interference by the state" and thus left untouched the jurisdiction of a state regulatory body to impose regulations on interstate commerce that were reasonable. This distinction was quoted and approved in the Barrett case and again in the Attleboro case.

Local regulations of a reasonable character were approved in the Pennsylvania Gas Company case which is factually parallel to the case at bar in so far as United Fuel distributes its Kentucky and West Virginia gas in Ironton and New Boston, Ohio. The case between Pennsylvania and West Virginia dealt with a state statute potentially capable of halting the entire interstate movement of all gas originating in West Virginia, a clear obstruction of interstate commerce and consequently clearly distinguishable from the case at bar even though that case still recognized the propriety of reasonable regulation by a state commission. In the People's Natural Gas Company case, the matter of interstate carriage of gas was only incidental to the decision of this court since that company was producing in Pennsylvania enough gas to meet the requirements of the Pennsylvania municipality (Johnstown) involved in the rate problem but it is strongly in point in that it holds that when the package is broken the state may act even though there was no definite earmarking of the various gases.

The United Fuel case in Kentucky involved an interstate carrier which dealt only in wholesale volumes of gas in Kentucky but this case is the first recognition of the fact

that intercorporate connections and affiliations must receive consideration when a state commission is regulating transactions affecting interstate commerce; we suggest that that case would have been much easier to decide if United Fuel had therein been retailing and distributing from the same line.

Like the utility in the Attleboro case, the Hope Natural Gas Company in the East Ohio case had only one customer in Ohio, a distribution company which purchased in wholesale quantities; it distributed no gas for itself in Ohio as does United Fuel in the case at bar, but therein as in the case at bar state regulation is proper when the pressure has been reduced for retail consumers.

In both the Western Distributing Company case and the Slattery case, interstate carriers again did only a wholesale business, and as in the Landon, Barrett and Attleboro cases, these movements of gas were held to constitute interstate commerce but, as in the United Fuel case in Kentucky, corporate affiliation was permitted to cut across the rigid barriers theretofore prohibiting state regulation affecting interstate commerce. We point out that in none of the foregoing cases did the interstate carrier transport gas in large volume from one state and sell it first at retail and then at wholesale from the same pipe line at the same time and at adjoining points.

None of these ten cases conflict with the commission's position in the case at bar; most of them, making due allowance for different factual situations, support it.

Although its effect was somewhat modified by the East Ohio case, *supra*, we suggest that there is nothing in the Pennsylvania Gas Company case, *supra*, to distinguish its following language from the case at bar or the East

Ohio case. Speaking of and quoting from the Minnesota Rate Cases (Simpson v. Shepard, 230 U. S., 532), the court said:

"The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that there existed in the states a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation. After stating the limitations upon state authority, of this subject, we said (p. 402): 'But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the states should continue to supply the needed rules until Congress should decide to supersede them

• • • Our system of government is a practical adjustment by which the national authority, as conferred by the Constitution is maintained in its full scope, without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress

must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.'

"The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from Federal control. June 18, 1910, Chap. 309, Sec. 7, 36 Stat. at L. 539, 544, Comp. Stat. Sec. 993, 8563, 5 Fed. Stat. Anno. 2d. ed. p. 1108, 4 Fed. Stat. Anno. 2d ed. p. 337.

"The thing which the state commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the state of New York."

(2) *The Decisions of This Court Considered in Their Chronological Order.*

It is equally interesting to consider these same decisions from a purely chronological point of view. When the first seven of these cases were decided, no mandate other than one of a strictly hands-off attitude came down to state regulatory bodies endeavoring to adjust gas rates for local consumers. True, as noted above, this court quoted at length from the Minnesota Rate Cases (*Simpson v. Shepard*, 230 U. S., 352) in the Pennsylvania Gas Company case, *supra*, but ten years were to pass before that quotation was put to use again in the United Fuel case in Kentucky with its clear permission to state regulatory bodies to extend their official inquiries, if necessary in the interest of justice and public welfare, to



dealings between affiliated companies even though those dealings were in the strictest sense interstate commerce.

A clear-cut application of the principle of looking behind corporate entities, the United Fuel case in Kentucky may have been due to either the great growth of utility holding company systems in the few preceding years, or to the recognition by courts of the fact that without any judicial curb the former attitude of strict observance of freedom of interstate commerce was beginning to defeat its own purpose, or both. Appellants state that the discussion of this court in the United Fuel case in Kentucky is directly relevant to and controlling over the case at bar. This court said, on page 309:

"The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. An important purpose of state supervision is to prevent such discriminations (see *New York ex rel. New York & Q. Gas Co. v. McCall*, supra, at p. 351, 62 L. ed. 342, P. U. R. 1918A, 792, 38 Sup. Ct. Rep., 122), and if a public service company may not refuse to serve a territory where the return is reasonable, or even in some circumstances where the return is inadequate, but that on its total related business is sufficient (*Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, supra, at p. 25 (51 L. ed. 944, 27 Sup. Ct. Rep., 585, 11 Ann. Cas., 398); *Missouri P. R. Co. v. Kansas*, supra, at p. 277 (54 L. ed., 478, 30 Sup. Ct. Rep., 330)), it goes without saying that it may not use its privileged position, in conjunction with the demand which it has created, as a weapon to control rates by threatening to discontinue that part of its service if it does not receive the rate demanded. The powers of the state, so far as the Federal Constitution is concerned, were not exceeded by the action of the

(state) commission, in compelling appellants to continue their service in the cities named so long as they continued to do business in other parts of the state, and to there avail of the extraordinary privileges extended to public utilities."

This was the first long step forward in the matter of utility regulation.

If Kentucky in 1929 might compel continuation of wholesale service so also may Ohio in 1932 inquire into, and establish, if necessary, the just and reasonable charge for such service especially when the interstate character of that service is extremely questionable if it exists at all.

Fifteen months later this court sustained in the East Ohio case a state excise tax even though it was levied on the proceeds of the sale of gas that had moved in interstate commerce; and nine months later, in the Western Distributing Company case, there came the first pronouncement of this court in gas rate litigation that consideration must also be given to such matters as arm's length bargaining, general and open market and bargaining and competition. That was the second long step forward. To receive constitutional protection, interstate commerce had formerly to be found free of improper intercorporate dealings; now it must also be conducted in an open market and where there is full opportunity to bargain and compete. There is no question of conflict between state and federal power; there is only the matter of the need of regulation and of meeting that need with the only available tools—state commissions.

It was nearly six years later before there was need or desire to explain further the doctrine of arm's length

bargaining but it was done in the Slattery case wherein exactly the same information was sought by a state commission as is sought by appellant commission herein, and wherein exactly the same claims of constitutional protection were made as have been asserted by United Fuel in the case at bar. In denying injunctive relief in the Slattery case, this Court on pages 306-307 said:

"We can find in the commerce clause and the Fourteenth Amendment no basis for saying that any person is immune from giving information appropriate to a legislative or judicial inquiry. A foreign corporation engaged exclusively in interstate commerce within the state is amenable to process there as are citizens and corporations engaged in local business. *International Harvester Co. v. Kentucky*, 234 U. S., 579, 58 L. ed., 1479; 34 S. Ct., 944. It is similarly subject to garnishment and writ of attachment. *Davis v. Cleveland, C. C. & St. L. R. Co.*, 217 U. S., 157, 54 L. ed. 708, 30 S. Ct., 463, 27 L. R. A. (N. S.) 823, 18 Ann. Cas., 907. It can be deemed to be no less subject, on command of a state tribunal, to the duty to give information appropriate to an inquiry pending there. The present investigation is not a regulation of interstate commerce and it burdens the commerce no more than the obligation owed by all, even those engaged in interstate commerce, to comply with local laws and ordinances, which do not impede the free flow of commerce, where Congress has not acted. *Smith v. Alabama*, 124 U. S., 465, 31 L. ed., 508, 8 S. Ct., 564, 12 Inters. Com. Rep., 804; *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S., 380, 56 L. ed., 240, 32 S. Ct., 152; *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S., 352, 402-412, 57 L. ed., 1511, 1542, etc."

If this is true of one which is purely and certainly beyond all dispute, legal or factual, an interstate carrier it is a fortiori true of an intrastate peddler.

The court's statement on page 307 of the Slattery case that

"This court has often recognized that the reasonableness of the price at which a public utility company buys the product which it sells is an appropriate subject of investigation when the resale rates are under consideration, and that any relationship between the buyer and seller which tends to prevent arm's length dealing may have an important bearing on the reasonableness of the selling price,"

was later qualified and at the same time clarified and detailed by the statement on page 308 that .

"The price itself may be found to be so exorbitant as to persuade that the bargaining was not at arm's length. *Corsicana Nat. Bank v. Johnson*, 251 U. S., 68, 64 L. ed., 141, 40 S. Ct., 82, *supra*."

Actually there is on this basis no difference between the Slattery case and the case at bar.

The only apparent difference between these two cases is the lack of corporate affiliation in the case at bar but that difference is cared for by the last preceding quotation. The lack of arm's length bargaining is as complete in the one case as in the other; in the former it is measured by corporate affiliation, in the latter by exorbitant price. The whole or a part of the metropolitan area of Chicago, Illinois, in the Slattery case may be a sufficiently populous and attractive an area to the expansion of the gas utility business to command its own market and its own competitive bargaining; but such a command is beyond the reach of the consumers of the city of Portsmouth, Ohio, especially in view of the added requirement of the recent federal Natural Gas Act that no utility described in that law may extend its lines to territory already being served by another utility without a cer-

tificate of convenience and necessity from the Federal Power Commission, and this of course assumes an alternate and otherwise available source of gas supply.

We thus see that over a period of years the growth of regulation always seems to be one step behind the growth of the regulated industry. When the gas utility companies were small regulation was purely local but as they grew in size state administrative bodies were handicapped in regulation by retention of the original interpretation of the purpose of constitutional safeguards over interstate commerce. The first break in that handicap was the recommendation by this Court of the extension of the principle of looking behind corporate entities. The second step was the recognition by this Court of the doctrine of arm's length bargaining, and the third step was the statement by this Court that the lack of arm's length bargaining may lie as distinctly in evidence of exorbitant price as in evidence of intercorporate affiliation. The case at bar falls squarely within the second and third of these steps even if it be conceded argumentatively that United Fuel's business herein constitutes interstate commerce.

This change in attitude has become so progressively noticeable that it recently caused the court in *People's Natural Gas Company v. Federal Power Commission*, 127 Fed. (2nd), 153, 158-159, to state that:

"It is true that in recent years the (Supreme) Court has widened its view of what "affects" interstate commerce and supports federal regulation, and also its view of what state interferences with interstate commerce are permissible in the absence of federal regulation."

If that is true of interstate commerce it is a fortiori true of the case at bar.



(3) *The Law of Interstate Commerce Generally.*

When we consider the commerce clause of the federal Constitution generally, we find that those coming into a state must abide by reasonable regulations and that it is not reasonable to assume that a state statute, affecting interstate commerce and intrastate commerce alike, is directed against interstate commerce, particularly if it does not unreasonably obstruct the freedom of that commerce among the states. *Lake Shore and Michigan Southern Railway v. State of Ohio ex rel., etc.*, 173 U. S., 285, 301-303, and the *Slattery case*, *supra* (302 U. S., 300). Within these bounds the relevant sections of the Ohio law and the commission's orders clearly fall.

We also find that whether a state has duly and properly exercised its power of regulation is a matter to be decided in view of the facts in each particular case (*Eliza Jane Hall, etc., v. DeCuir*, 95 U. S., 485; *Wisconsin M. and P. Railroad v. Jacobson*, 179 U. S., 287, 297, 302; *Ware and Leland et al. v. Mobile County*, 209 U. S., 405, 409; and *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S., 495), and that such constitutional conceptions as interstate commerce, due process and equal protection are formulae to be determined by the gradual process of inclusion and exclusion; there is no set rigidity prohibiting consideration of each case on its own facts. *Santa Cruz Fruit Packing Company v. National Labor Relations Board*, 303 U. S., 453, 467. We further find that the orders of appellant commission, dated April 18, 1935, and May 29, 1935, did not and do not deny or obstruct the right to engage in interstate commerce (*W. N. Barrett, etc., v. City of New York et al.*, 232 U. S., 14, 31)

since there was no tax levied, no revenue sought, no impediment imposed and no burden or obstruction laid, only a rule indicating that as one comes into the state of Ohio he must conduct his business justly and reasonably.

These principles have so grown and matured in our jurisprudence that although there may at first blush seem to be inconsistent decisions we find on closer scrutiny that it is possible to trace backward, for example, from such recent decisions as *E. Pat Kelly v. State of Washington et al.*, 302 U. S., 1, to the earliest cases without finding any deviation from the basic idea that even if a transaction constitutes interstate commerce, Congressional inaction thereon is not per se a bar to all state legislation touching on that subject nor is Congressional action a bar unless it fully occupies the field. See also *The License Cases* (*Thurlow v. Massachusetts*), 5 Howard, 504, 579-583, and *Parkersburg and O. Trans. Company v. Parkersburg*, 107 U. S., 691.

Or let us start with *Smith v. Alabama*, 124 U. S., 465, 477, wherein this court, in holding that state regulations may incidentally affect interstate commerce so long as Congress is silent, said:

"But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether ex contractu or ex delicto, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular state does not govern that

relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject,"

and bring that principle down through *Illinois Natural Gas Company v. Central Illinois Public Service Company*, 314 U. S., 498, which, in spite of its primary basis in the Natural Gas Act, held that:

"In other cases the court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." (Citing various authorities.)

In these cases it is significant, as in *General Oil Company v. Crain*, 209 U. S., 211, 229, 231, and *Western Live Stock, etc., v. Bureau of Revenue*, 303 U. S., 250, 254, that even though regulation of interstate commerce is primarily in Congress, still if there is a meritorious reason for a local regulation or tax it will be sustained even though it has a direct effect on interstate commerce so long as the regulation is not directed primarily at and does not unduly burden that commerce which either actually or seemingly is interstate. So is this true even though Congress has not acted or has acted in only a part of the field and there is consequently a question whether federal inaction or local regulation will prevail. See *Lone Star Gas Company v. State of Texas et al.*, 304

U. S., 224, *Duckworth v. Arkansas*, 314 U. S., 390, and *Pennsylvania Milk Control Board v. Eisenberg Farm Products*, 306 U. S., 346. This discussion of these principles would be necessary if United Fuel's transactions in the case at bar constituted interstate commerce, but as it is, these principles are simply an added bulwark to the commission's action even if we assume *arguendo* that interstate commerce exists herein.

There was never any lack of power in the states to regulate commerce; if there had been there would have been no need for what is referred to as the commerce clause of the Constitution. The primary purpose of that clause is not so much to bar the states of the use of their regulatory powers as it is to insure through federal action uniformity of regulation in matters of national interest and freedom from conflicting state regulation. (See *Interstate Commerce Commission v. B. & O. Railroad*, 145 U. S., 263, and *New York Central and H. R. Railroad v. United States*, 212 U. S., 481, 496.) If there is no such interest and no such confliction, the states are free to act; but even if there is such an interest, it must be found that the state regulation imposes undue burdens, interruptions or obstructions on interstate commerce before the regulation is held to be invalid. See *Santa Cruz Fruit Packing Company v. National Labor Relations Board*, *supra* (303 U. S., 453, 466), and *Western Union Telegraph Company v. James*, 162 U. S., 650, 661, 662.

The intention has never been to permit a trade or profession to assume greater importance in the eyes of the law than does the public interest affected thereby even though public interest is measured in terms of one medium-sized city. If there is no national interest, there is

no power in Congress to legislate; if there is no conflict with interstate commerce, there is no jurisdiction in the courts to hold invalid a state regulation on the basis of interstate commerce. This court has so held in *Missouri, K. & T. Railroad v. Haber et al.*, 169 U. S., 613, 627, when it stated:

"Nor is the statute of Kansas to be deemed a regulation of commerce among the states, simply because it may incidentally or indirectly affect such commerce. *Hennington v. Georgia*, 163 U. S., 299, 317 (41:166, 174); *New York, N. H. & H. Railroad Co. v. New York*, 165 U. S., 628, 631 (41:853, 854); *Chicago, Milwaukee & St. Paul Railway Co. v. Solan*, 169 U. S., 133 (ante, 317); *Richmond & Alleghany Railroad Co. v. R. A. Patterson Tobacco Co.* in 169 U. S., 311 (ante, 385), and authorities cited in each case. Although the power of Congress to regulate commerce among the states, and the power of the states to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and state governments; or produce any conflict between the two governments in the exercise of their respective powers, need occur, unless the national government; acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the state legislation may refer."

Furthermore, if we assume again that the dealings between United Fuel and the Portsmouth Gas Company constitute interstate commerce, and if we are willing to look at those transactions as did the District Court in the case at bar without seeing any dealings of United Fuel with its same facilities at New Boston and Ironton, Ohio, it still must be borne in mind that the laws of the state of Ohio, and the orders of appellant commission based thereon, place no impediment on such commerce,



restrain no movement thereof and lay no burden thereon. The only result of the commission's orders is to require a justification for a course of action which is of interest to only one community. Congress had not acted and no court has jurisdiction to establish a fair distribution rate. No other body with power to act was interested in the rates paid by the gas consumers in the city of Portsmouth. Only the state of Ohio through appellant commission could relieve against a situation entirely and clearly local in character. This it did.

In closing, it is idle to conjecture the nature of the evidence that United Fuel would have produced or of the action that the commission might have taken thereafter, but the facts of the case at bar are such that it is something more than idle speculation to assume that if United Fuel is compelled to reconcile a price of 37 cents to the Portsmouth Gas Company with a price of 22.035 cents to a company affiliate, it is far more troubled by the effect upon it of some future order of the commission than it is by the thought of having to do no more than produce its records. The propriety of such type of interim order is discussed in *Rochester Telephone Corporation v. United States*, 307 U. S., 125, in the *Slattery* case, *supra* (302 U. S., 300), and in *East Ohio Gas Company v. Federal Power Commission*, 115 Fed. (2nd), 385, which cited and followed the *Rochester Telephone* case. None of these three cases is as strong, however, as the case at bar because herein it must once again be borne in mind that the transactions to which the orders of appellant commission are directed are not interstate commerce.

## II.

**AT NO TIME IN THE PROCEEDINGS BEFORE THE  
COMMISSION WAS UNITED FUEL DENIED  
DUE PROCESS OF LAW.  
(Assignments of Error, Nos. 1, 10, 11, 12, 13, 14.)**

Since it must be borne in mind that the action of a state commission in setting rates is of a legislative rather than judicial character (*Prentis v. Atlantic Coast Line Company*, 211 U. S., 210), four matters tend to relieve from the necessity of a protracted discussion of United Fuel's claim that it has been denied due process of law. These four matters are: (1) The complete protection on all such matters afforded to all participants and parties before appellant commission under the statutes of Ohio set forth in Appendix 3 attached to this brief; (2) the general law on the subject of due process, particularly concerning resultant costs; (3) the complete failure of United Fuel to press any such claim with the equally complete absence of any finding of lack of due process by the District Court in its decision, and (4) the fact that the proceedings before appellant commission were not allowed to reach a point wherein it was possible to deny due process to any party before United Fuel instituted its action in the District Court below. These matters will be discussed in the order just given.

In *Federal Power Commission v. Natural Gas Pipe Line Company*, 315 U. S., , 86 L. ed., 699, 704, this court recently upheld the constitutionality of the Federal Natural Gas Act and the orders of the Federal Power

Commission made thereunder and stated that there can be no doubt, under either the Fifth or Fourteenth Amendments, of the propriety of the regulation of the price of gas distributed through pipe lines for public consumption. If that statement is true of the Federal Power Commission acting under the Natural Gas Act, it must be correspondingly true of the Ohio commission acting under the Ohio law prior to the enactment of the Natural Gas Act, particularly in view of the unusual facts of this case. The fifth syllabus of that case states that:

“The power of a state or of Congress, for protection of the public interest, to regulate price, extends, under the Constitution, to wholesale, as well as retail, sales.”

As far back as *Barbier v. Connolly*, 113 U. S., 27, it was held that the Fourteenth Amendment was not designed to interfere with the police power of the states. It was more recently stated in *Great Northern Railroad v. State of Washington*, 300 U. S., 154, 160, that reasonable regulation of utilities does not violate the equality requirement of the Fourteenth Amendment (in connection with which it should be noted that the relevant paragraphs of Section 614-2, Ohio General Code, apply to all alike). And about midway between these decisions this Court, in considering an Ohio statute dealing with industrial relations, stated in *Rail and River Coal Company v. Yapple et al.*, 236 U. S., 338, that the right to move to rescind or modify, or to rehear, the right of appeal and stay of execution are adequate protection to constitute and insure due process. Moreover, in another Ohio case, *J. P. Grubb v. Public Utilities Commission of Ohio*, 281 U. S., 470, 474, which involved the same appeal statute

which United Fuel could have made use of, this Court said that the laws of Ohio provide for "a review of formal orders of the (appellant) commission by the Supreme Court of the state—a judicial review culminating in adjudgment." The third syllabus of that case is of material interest herein in stating that

"The commerce clause of the federal Constitution does not operate to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation, or attempted regulation, of interstate commerce."

Needless to say, United Fuel sought to exercise none of those enumerated statutory rights, all of which were established long prior to the commencement of its action herein. It chose instead to go into the federal courts and assert that an unexercised right in the state courts was so inadequate as to deny it due process even though this Court had held some years previously in the Grubb case that right to be adequate.

(2) If anything more need be added on the subject of due process it may be stated that it has already been held that the expenditure of a large sum of money to comply with an order of a state regulatory body is not of itself enough to warrant the granting of federal injunctive relief; it is indeed no more than an incident to the transaction of the type of business in which United Fuel is engaged. See the Slattery case, *supra* (302 U. S., 300), *East Ohio Gas Company v. Federal Power Commission*, *supra* (115 Fed. (2nd), 385), *Lake Shore and Michigan Southern Railway Company v. State of Ohio*, *supra* (173 U. S., 285), and *Petroleum Exploration, Inc., v. Kentucky Public Service Commission*, 304 U. S., 209, 222-223. In this last case appellant produced and bought natural

gas in Kentucky. Its situation was identical with that of United Fuel at Portsmouth in that its business was wholesale and it consequently was not connected directly with the distribution rate in question. The Kentucky commission ordered it to present evidence as to the reasonableness of its wholesale rates and to make its records available. The denial of injunctive relief by a statutory three-judge federal district court was affirmed by this Court on appeal.

This Court said:

"Fifth: Our conclusion that this is not a threatened injury justifying intervention is strengthened by a balancing of conveniences. By the process of injunction the federal courts are asked to stop at the threshold, the effort of the Public Service Commission of Kentucky to investigate matters entrusted to its care by statute of that commonwealth obviously within the bounds of state authority in many of its provisions. The preservation of the autonomy of the states is fundamental in our constitutional system. The extraordinary powers of injunction should be employed to interfere with the action of the state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant. 'Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state.' The Kentucky statute in question contains detailed provisions for hearings and judicial review. These include notice, procedural rules before the commission, right to counsel, production of evidence, service of orders, rehearing, process for parties and witnesses, depositions, record of proceedings, review of orders by court and appeal to the state court of last resort. The compulsory and punitive powers of the commission are exercised through judicial process. When the only ground for interfering with the state procedure is the cost of preparing for a hearing, there is no occasion for equitable intervention."



The trend to this conclusion from the earlier Landon, Barrett and Attleboro cases, all *supra*, was clearly referred to by the United States Circuit Court of Appeals in *People's Natural Gas Company v. Federal Power Commission*, also *supra* (127 Fed. (2nd), 153).

(3) We limit this portion of the discussion to pointing out that no finding of lack of due process of law was made by the District Court probably because the existence of the various statutes of the state of Ohio which are appended to this brief precluded the making of any such finding. Moreover, the nature of the commission's orders make it extremely questionable in the light of the *Slattery* case, *supra* (302 U. S., 300), *East Ohio Gas Co. v. Federal Power Commission*, *supra* (115 Fed. (2nd), 385), and *Rochester Telephone Co. v. United States*, *supra* (307 U. S., 125), whether the District Court should not *sua sponte* have dismissed this case when it was first submitted.

(4) In *Kansas State Corporation Commission v. Wichita Gas Company*, 290 U. S., 561, 569, this court was confronted with a situation wherein in the course of a general rate investigation the state commission therein involved, ordered certain gas distribution companies to refrain, *inter alia*, from setting up as operating costs more than 30 cents per M c. f. for gas purchased from an interstate carrier and from setting up any and all service charges to a common affiliated company. Injunctive relief was sought by the carrier and distribution companies alike on the same grounds put forward by *United Fuel* in the case at bar, *viz.*, conflict with the commerce and contract clauses of the United States Constitution and violation of the due process clause of the

Fourteenth Amendment. The granting of relief was reversed by this Court on the ground that the orders of the Kansas commission, being for the purpose of obtaining information to be used later in the establishment of reasonable rates, were legislative in character and equitable relief was consequently premature. The proceeding before appellant commission in the case at bar had not ever reached that advanced stage when United Fuel instituted its action herein.

Even though due process of law is not measured in the case at bar by the same strict test which confronts it in a judicial tribunal (*Lake Erie and Western Railroad v. Illinois Public Utilities Commission, ex rel., etc.*, 249 U. S., 422, 424), the phrase itself, if it has any meaning at all, requires rather than impedes an inquiry why sales at one point to an affiliate are consummated at 22.035 cents per M c. f. and at a nearby point to a stranger at 37 cents per M c. f. "Due process of law" may no more than "arm's length bargaining" be used as a verbal accessory after the fact.

## III.

**THE TWO SAID ORDERS OF THE COMMISSION  
HAVE NOT IMPAIRED EITHER THE CON-  
TRACT BETWEEN UNITED FUEL AND THE  
PORTSMOUTH GAS COMPANY OR ANY CON-  
TINUATION THEREOF TO DATE.**

**(Assignments of Error, Nos. 1, 3, 4, 10; 11, 12, 13, 14.)**

As seen in *Federal Power Commission v. Natural Gas Pipe Line Company*, supra (315 U. S., , 86 L. ed., 699), the power of both state and federal governments to regulate the price of gas distributed through pipe lines for public consumption has been too long and too consistently recognized as a proper subject of regulation under the Fifth and Fourteenth Amendments to admit of doubt at this late date. Any such regulations fall within the category of the police power and as such are but another name for the power of government. Indeed, the sections and clauses of the United States Constitution and its various amendments called upon by United Fuel in the case at bar to justify its reticence in opening its records have recently been denied by this court to be "a guaranty of untrammelled freedom of action and of contract." See *Virginian Railway Company v. System Federation*, No. 40, 300 U. S., 515, 558.

There is no problem of rights and duties being in *pari materia* when there arises a seeming conflict between the constitutionally protected right of private contract and the power and duty of a state to exercise its police power. In the case of any such assumed conflict, the due exercise of the police power prevails. The involved private rights

and public power are not equal and where they clash the individual right (to contract) is the one which must give way as in the case at bar where United Fuel sells to an affiliate for 22.035 cents and to a so-called stranger at the tag end of the list for 37 cents.

This court having long since held that the police power of a state may place restraints on the power to enter into private contracts (*Rail and River Coal Company v. Yaple et al.*, supra (236 U. S., 338), and *Union Dry Goods Company v. Georgia Public Service Corporation*, 248 U. S., 372) has since then held in *Midland Realty Company v. Kansas City Power and Light Company*, 300 U. S., 109, that action by a state commission in setting a rate different from that of a pre-existing contract does not violate either the contract or due process clauses of the United States Constitution. It is, moreover, settled law that before this court will interfere with a state statute limiting in an exercise of the police power the right of contract, there must not only be a clear case of abuse but also, this Court, in making such a determination, should not exercise a too precise line of reasoning. *Mutual Loan Company v. Martell*, 222 U. S., 225.

When we consider legislative rather than judicial limitation on the power of states to regulate businesses within their geographic bounds, it is well established that the intention of Congress to exclude states from exercising their police power must be clearly manifested. *Napier, Attorney General, etc., v. Atlantic Coast Line Railroad*, 272 U. S., 605, 611; *Reid v. Colorado*, 187 U. S., 137, 147; *Mintz v. Baldwin*, 289 U. S., 346; *Kelley, etc., v. State of Washington ex rel., etc., supra* (302 U. S., 1, 9-14). In connection with these various principles we

point out not only that it is clearly no abuse of power to inquire into the obvious discrepancy of United Fuel's charges while operating in Ohio both wholesale and retail from the same facilities but also that in so far as Congress is concerned, no federal action even remotely connected with the situation found in the case at bar was taken until the ordinance in question was four and a half years expired and the present litigation was a little over three-years old; then, its action was too late.

In many corresponding situations this state power of regulation has been upheld. In *Dayton Power & Light Company v. Public Utilities Commission of Ohio*, 292 U. S., 290, there was an appeal to this court from a distribution rate order of appellant commission. While the fifth syllabus of that case, when applied to the case at bar, states clearly that United Fuel herein has not sustained the burden of proof resting on it we wish primarily to point out that this Court said on page 308:

"Even so the burden of proof was on the buyer of the gas to show that in these transactions with the affiliated seller the price was not higher than would be fairly payable in a regulated business by a buyer unrelated to the seller and dealing at arm's length. *Western Distributing Company v. Public Service Commission*, 285 U. S., 119, 124, 76 L. ed., 655, 658, 52 S. Ct., 283."

It is respectfully submitted that if affiliates must show that they are not dealing at prices over and above what strangers would pay, it is at least equally true that a carrier must show why it charges more to a stranger than it sees fit to charge to its affiliate; if this conclusion is incorrect then our system of jurisprudence does recognize a vested right to do a manifest wrong.



A state statute requiring certain inspection of oils and fluids was approved many years ago in *E. E. Patterson v. Commonwealth of Kentucky*, 97 U. S., 501. The second syllabus of that case states that:

"The right conferred upon a patentee and his assigns to use and vend an oil for illuminating purposes, created by the application of a patented discovery must be exercised in subordination to the police regulations which the state established by such statute."

If property derived from a federally patented right may be subjected to a state inspection law, it is illogical to hold that questionable participation in interstate commerce may not be equally subservient to a state regulation especially in view of the circumstances of the case at bar.

Another case in point is *Louisville and N. Railroad v. Commonwealth of Kentucky*, 161 U. S., 677, 700, which involved the constitutionality of a state statute prohibiting railroads from buying up parallel and competing lines. In upholding the statute, this Court approved the general principle "that where the police power is invoked in good faith for the prohibition of a practice which the Legislature has declared to be detrimental to the public interest it will be sustained whenever it can be done without the impairment of vested rights." Assuming that the right to contract might be classified as a vested right, it still does not follow that there is or can be a vested right to charge an affiliate 22.035 cents and a stranger 37 cents.

Other cases of interest are *Alabama v. King and Boozer*, etc., 314 U. S., 1, wherein a state sales tax was upheld even though it was ultimately paid by the United

States Department of War, and *Memphis Natural Gas Company v. Beeler, Attorney General etc.*, 315 U. S., 86 L. ed., 745, 750, wherein a non-discriminatory state tax upon an interstate business was approved; it would also seem to follow that if a tax in Virginia on the sale of bread baked in West Virginia is proper as was held in *Caskey Baking Company v. Commonwealth of Virginia*, 313 U. S., 117, 119, the regulation in Ohio of gas produced in West Virginia and Kentucky which might be used to bake bread is equally proper. See also *Clark et al. v. Poor et al.*, 274 U. S., 554. We submit that if the orders in question of appellant commission impair United Fuel's contract so does every order of the Federal Power Commission under the Natural Gas Act also impair every contract affected thereby.

We close this portion of the discussion by referring the court to *Nebbia v. People of the State of New York*, 291 U. S., 502, 523, 527, 539. That case related to a phase of regulation of the milk industry in the state of New York, which industry in that state, like the gas industry in Ohio, has long been subject to regulation. In holding valid the state statute regulating the retail selling price for milk, this Court said:

"Under our form of government the use of property and the making of contracts are normally matters of private and not public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; the government can not exist if the citizen may at will, use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

Another excerpt from that decision is that:

"The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power."

We wish particularly to point out that this Court said that:

"The Constitution does not guarantee unrestricted privilege to engage in a business or to conduct it as one pleases."

And also that it said:

"The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at liberty or upon any substantial group of people."

There has been, we respectfully submit, no impairment by appellant commission of any contract that United Fuel may have entered into. The purposes of the United States Constitution are set forth in the preamble thereto and the various articles, sections and clauses of that Constitution and its various amendments are no more than requirements and restrictions seeking to insure the purposes set forth in the preamble. That preamble seeks statedly, to "establish Justice" and to "promote the general Welfare" but neither of these purposes will be served by requiring the Portsmouth Gas Company to pay fifty percent more for its gas, if there is any left after affiliates have been supplied. In any event, appellant commission is entitled to know why this is being done.

## IV.

**THE FEDERAL NATURAL GAS ACT HAS NO BEARING AT ALL ON THE CASE AT BAR.****(Assignments of Error, Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14.)**

The municipal rate ordinance in question was enacted by the city of Portsmouth on February 24, 1932. Its life was the balance of the franchise period, two years. The appeal of the Portsmouth Gas Company to appellant commission was prompt and, subsequent thereto, the commission found that the ordinance rate was confiscatory. Significantly, it also found that it could not determine a reasonable substitute rate without further information relative to the wholesale rate charged by United Fuel to the Portsmouth Gas Company. Hence the requirement that United Fuel produce sufficient evidence and records "to prove a reasonable and just rate to be charged by it to the Portsmouth Gas Company." This order was somewhat modified as to findings by the commission's order of May 29, 1935, but the requirements directed to United Fuel were unchanged.

Five or six weeks later United Fuel went into the local District Court and instituted the proceedings which are the basis of this appeal. Three years later the Natural Gas Act (June 21, 1938, c. 556, sec. 1, 52 Stat., 821; 15 U. S. C. A., ch. 15B, sec. 717 et seq.) was passed.

From such a chronological narrative of events herein it is obvious that there can not possibly be any doubt that the Natural Gas Act is inapplicable to the determination of either a distribution rate for the city of Ports-

mouth or a wholesale rate between United Fuel and the Portsmouth Gas Company. Any one of four separate counts removes the Natural Gas Act as a factor in the case at bar. (1) It was enacted three years after the inauguration of this case in the District Court, six and a half years after the Ohio commission's jurisdiction was first invoked; (2) the Natural Gas Act is not per se retrospective in operation; (3) the establishment of rates under the Natural Gas Act are statedly effective only from that date onward, not into the past even for the definite period of a distribution rate ordinance; (4) the availability of records filed with the Federal Power Commission as required by the Natural Gas Act does not, and can not, make such records controlling with regard to a period from three to six and a half years prior to the passage of that Act.

(1) The Ohio statutes quoted in Appendix 3 attached to this brief, especially Section 614-46, show that when appellant commission establishes a substitute rate it shall be "during the period so fixed by ordinance," viz., February 24, 1932 to February 24, 1934. The entire period ended nearly four and a half years before the Natural Gas Act ever became a law. It should furthermore be noted that there is no hint at all of retrospection in the Natural Gas Act; since its provisions were to become effective only after the passage of the law, the entire import of its provisions is directly away from the past. It is futile to argue that the jurisdiction of appellant Ohio commission was nullified by a statute passed six and a half years after appellant commission's jurisdiction was first invoked; we urge this particularly when we consider that if it had not been for the unfortunate death of two United States judges the case at bar would have been de-



cided in the District Court years before the Natural Gas Act ever found a place on the statute books of this country.

(2) It must also be borne in mind as conclusive evidence of the complete lack of intention to make the Natural Gas Act retrospective that any rate established by the Federal Power Commission thereunder shall be effective only from and after the date of its finding under such act. Consequently, since the period of the rate ordinance in question was from February, 1932, to February, 1934, and since appellant commission was directing its inquiry to that period, it follows that even if the Federal Power Commission had had jurisdiction and had had a gate rate ready for use on the day the Natural Gas Act became law, its action would still have been from four and a half to six and a half years too late.

(3) We also point out that the District Court in neither its decision of October 3, 1941, nor its decree of January 16, 1942, made any statement or finding that the Federal Power Commission had exercised in the premises any jurisdiction that might have been conferred upon it by the Federal Natural Gas Act; any such finding, had it been made, would have been even further out of date than was the passage of that law. The point even further is that if the Natural Gas Act had been passed prior to the appeal of the Portsmouth Gas Company to appellant commission in the early part of 1932, appellant commission would still have had full jurisdiction in the premises unless the Federal Power Commission endeavoring to exercise powers under the Natural Gas Act had not only found that it had jurisdiction dating back to a time prior to the creation of its jurisdiction but had also determined as to United Fuel a "reasonable and just rate to be

charged by it to the Portsmouth Gas Company" during that prenatal biennium of Portsmouth's ordinance, and this Court had in the teeth of the Natural Gas Act, approved any such finding and determination.

There have been several decisions of this court bearing out the impossibility of any such contention. As long ago as *Western Union Telegraph Company v. James* (162 U. S., 650, 660-661), it was held that in frequent cases congressional silence is not equivalent to express enactment and especially is this true where state police power is used to insure prompt and faithful performance of a duty within a state. Hence state action in such situations is proper in the absence of action by Congress. From this humble beginning the principle moved on in *Missouri K. & T. Railroad v. S. O. Harris*, 234 U. S., 412, 417-421, wherein there was in issue the validity of a state statute granting a small attorney's fee in the case of minor litigation successfully conducted against a railroad. This Court said that while certain principles of law therein discussed were sound,

"it is equally well settled that mere creation of the Interstate Commerce Commission and the granting to it of a measure of control over interstate commerce does not of itself and in the absence of specific action by the commission or by Congress itself, interfere with the authority of the states to establish regulations conducive to the welfare and convenience of their citizens, even though interstate commerce be thereby incidentally affected so long as it be not directly burdened or interfered with. *Missouri Pacific Railroad Company v. Larabee Flour Mills Company*, 211 U. S., 612, 613, 53 L. Ed., 352, 361, 29 S. Ct. Rep., 214; *Southern Railway Company v. Reid*, 222 U. S., 424, 437, 56 L. Ed., 257, 260, 32 S. Ct. Rep., 140."

The principle was again utilized in *Smith et al. v. Illinois Bell Telephone Company*, 282 U. S., 133, 159-160, where in the course of a telephone rate case the courts held it proper for a state commission to establish a rate of depreciation even though the Interstate Commerce Commission had a corresponding matter under consideration and would rule thereon at no distant date. The matter then came squarely to a head in *Northwestern Bell Telephone Company v. Nebraska Railroad Commission*, 297 U. S., 471, 478-479, 480. While the Interstate Commerce Commission and the Federal Communications Commission therein were successively holding hearings looking to the establishment of rates of depreciation for telephone companies, the Nebraska commission set such a rate for a period covering in part the period of time which the two federal agencies had under consideration. In holding that the Nebraska commission was not ousted of jurisdiction by the pending proceedings before the two federal commissions, it was said: "The (federal) statute did not envisage immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the commission would be prepared to act. It can not be supposed that Congress intended by the amendment to Section 20(5) to preclude all regulation, state and national, of depreciation rates for the telephone companies, for an indefinite time until the Interstate Commerce Commission could act administratively to prescribe rates" (citing various authorities).

The fears of this Court expressed in the last sentence of the preceding quotation have been amply borne out in the case at bar. And particularly is this so when we con-

sider that this Court said further in the Northwestern case that:

"In any event, we think that Section 20(5) cannot be read as authorizing the Interstate Commerce Commission to supplant state power to regulate depreciation rates of telephone companies except by prescribing a rate administratively determined by the commission itself. A direction that the commission, as soon as practicable, prescribe depreciation rates, is hardly to be read as authority to permit the telephone companies to fix the rates for themselves in defiance of state power. The doubtful constitutionality of the statute if so construed precludes our acceptance of such a construction."

This principle has been followed in other fields of regulation. In *South Carolina State Highway Department v. Barnwell Brothers, Inc., et al.*, 303 U. S., 177, 185, 190-192, this Court, in upholding a state law imposing a twenty thousand pound load limit on all common carriers by motor vehicles interstate and intrastate alike, stated that:

"Notwithstanding the commerce clause, such regulation in the absence of congressional action has, for the most part, been left to the states by the decisions of this court subject to the other applicable constitutional restraints."

Later in *H. P. Welch Company v. State of New Hampshire*, 306 U. S., 79, it was held that a state might limit the hours a driver of a motor vehicle for hire might work and that such a statute was not superseded by a federal statute on the same subject until the proper federal administrative agency had acted under that law and its regulation had become effective. To the same effect, see *People of the State of California v. Thompson*, 313 U. S., 109, 115-116.

We also wish to call the attention of the Court to *Eichholz v. Missouri Public Service Commission*, 306 U. S., 268, 273, involving a statute empowering the Missouri Public Service Commission to grant certificates to common carriers by motor vehicle engaging in interstate commerce. This Court held that the Missouri commission had jurisdiction to cancel such a certificate even though the holder had an application for a corresponding certificate pending before the Interstate Commerce Commission. Syllabus 5 of that case states that:

"In the absence of the exercise of federal authority over interstate commerce, and in the light of local exigencies, a state is free to act in order to protect its legitimate interests in the regulation of intrastate commerce even though interstate commerce is directly affected thereby."

Nor is this principle peculiar to common carriers by motor vehicle alone. In the car transfer case, *Missouri Pacific Railroad v. Larabee Flour Mills Company*, 211 U. S., 612, 623, this Court said:

"In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce, and a delegation of that control to a commission, necessarily withdraws from the state all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission, the control of the state over these incidental matters remains undisturbed."



(4) Even if the Natural Gas Act had a retrospective operation, which it does not have, lack of any action thereunder by the Federal Power Commission would prevent that statute from having any applicability to the case at bar and although the District Court seemed to indicate that appellant commission would be at liberty to call on the Federal Power Commission for testimony or records, no attempt was made to point out how any such information or records received by the Federal Power Commission some time subsequent to June, 1938, would be either controlling or relevant in the case of a two-year period commencing six and a half years prior to the receipt of such information and records, if any, by the Federal Power Commission.

### CONCLUSION.

In conclusion and by way of summary, appellants say that (1), in view of the fact that United Fuel wholesales and retails its gas from the same line at the same time and to adjoining and nearby communities in Ohio, it is and was at the time in question both a gas company and a pipe-line company within the contemplation of the relevant statutes of the state of Ohio, and as such and with regard to the facilities involved in the case at bar, it is and has not been engaged in interstate commerce, but to the contrary is subject to the jurisdiction of appellant commission in the premises; (2) in view of the fact that United Fuel sells gas on a priority footing as to supply and demand to an affiliate at 22.035 cents per M c. f. and at the same time and on a residual footing as to supply and demand to the unaffiliated Portsmouth Gas Company at 37 cents per M c. f., there has been no arm's length

bargaining between United Fuel and the Portsmouth Gas Company; and the orders of appellant commission dated April 18, 1935, and May 29, 1935, respectively, do not deny United Fuel due process of law or impair its contract with the Portsmouth Gas Company, but to the contrary any such contract requires investigation by appellant commission, as the only existing agency in the premises on the alternative of a complete denial of protection of public interest; (3) due process of law has not been denied United Fuel nor has its contract been impaired; (4) the federal Natural Gas Act has no bearing on or connection with the case at bar. The transactions between United Fuel and the Portsmouth Gas Company are neither factually nor legally interstate commerce; not even the test of arm's length bargaining can change that conclusion. But if these transactions do constitute interstate commerce the orders of appellant commission are not an unwarranted, illegal or unconstitutional regulation thereof. In either event, the statutes of the state of Ohio (appearing in Appendix 3 hereto) show beyond question both that United Fuel has not been denied due process of law, and also that its contract with the Portsmouth Gas Company has not been impaired. The Natural Gas Act obviously has no bearing at all on this case.

The decision and order of the District Court should be reversed and United Fuel's action dismissed.

Respectfully submitted,

THOMAS J. HERBERT,

Attorney General of Ohio,

KENNETH L. SATER,

Special Counsel for The Public Utilities Commission  
of Ohio,

Counsel for Appellants.

## APPENDIX 1.

### Before The Public Utilities Commission of Ohio.

No. 7750—In the matter of The Portsmouth Gas Company's complaint of, and appeal from, Ordinance No. 8, Year 1932, passed by the council of the city of Portsmouth, Scioto County, State of Ohio, February 24, 1932, "fixing the rate or rates to be charged to consumers for natural gas distributed by The Portsmouth Gas Company, a corporation distributing natural gas in the City of Portsmouth, Ohio."

This day, after full hearing and argument by counsel, this matter came on for consideration upon the complaint and appeal by The Portsmouth Gas Company from the ordinance passed February 24, 1932, by the council of the city of Portsmouth, Ohio, fixing and prescribing as maxima the following rates for the furnishing of natural gas service to the citizens, public grounds and buildings of the city of Portsmouth, Ohio, for the duration of the franchise of said The Portsmouth Gas Company passed June 21, 1899, to wit:

45¢ per 1,000 cubic feet with a discount of 5¢ per 1,000 cubic feet, if bills are paid within ten days after the rendition of the monthly statement by the gas company.

Monthly minimum charge..... 50 cents  
and the testimony and exhibits offered and introduced in evidence upon such hearing and the argument of counsel.

The appellant elected to and under an undertaking duly filed herein has charged during the pendency of this proceeding the following schedule of rates which was in

effect immediately prior to the effective date of the ordinance complained of and appealed from:

First 1,000 cu. ft. or less per month .....	85¢
Over 1,000 cu. ft. per month....	60¢ per M cu. ft.
Discount for prompt payment...	5¢ per M cu. ft.

The appellant produces no gas and purchases from the United Fuel Gas Company all of the gas which it distributes under a contract which, with an adjustment for leakage, prescribes a price of 37 cents per 1,000 cubic feet.

By order, made and entered in this proceeding on June 18, 1934, the said United Fuel Gas Company was made a party and directed to file a copy of the contract whereunder it supplies gas to the appellant. No proceeding was instituted seeking a reversal of this order.

The appellant, The Portsmouth Gas Company, offer in evidence its record tending to show that the cost of rendering service in the city of Portsmouth, exclusive of cost of purchasing gas, taxes and the necessary allowance for depreciation, for the fiscal years ended February 29, 1932, and February 28, 1933, was as follows:

	1932	1933
Transmission and Distribution:		
Operation .....	\$15,492.04	\$16,359.16
Maintenance .....	36,147.50	19,900.51
Commercial Expense .....	19,199.35	19,077.12
New Business Expense .....	16,416.77	10,394.05
General Expense:		
Operation .....	46,628.43	41,948.81
Maintenance .....	1,372.45	1,246.02
	<u>\$135,257.04</u>	<u>\$108,925.67</u>

The United Fuel Gas Company has presented no evidence tending to show the cost of supplying gas wholesale to The Portsmouth Gas Company.

The commission coming first to determine the valuation of the property of the appellant, The Portsmouth Gas Company, actually used and useful, for the furnishing of natural gas service, by said company, to consumers and to the public in the city of Portsmouth, Ohio, and after considering the evidence and exhibits offered at said hearing, and having completed an independent inventory and valuation of said property, and being fully advised in the premises, finds and ascertains the value of the several kinds and classes of the property of The Portsmouth Gas Company used and useful for the convenience of the public and for the natural gas service to its consumers and to the public in the city of Portsmouth, Ohio, and of said property as a whole, as of February 24, 1932, to be as set forth in the following summary (the grand totals of which are reproduction costs \$761,939, depreciation \$94,151, and present value \$667,788), viz.:

	Reproduction Cost New	Depreciation	Present Value
District Regulator Structures.....	\$ 1,268.00	\$ 175.00	\$ 1,093.00
Gas Receivers and District Regulators .....	5,647.00	918.00	4,729.00
Distribution Line Equipment.....	359,498.00	49,667.00	309,831.00
Service Line Equipment.....	151,201.00	17,237.00	133,964.00
Meters .....	93,664.00	13,893.00	79,771.00
Meter Installations .....	15,884.00	2,353.00	13,531.00
General Office Land.....	13,073.00	0.00	13,073.00
Other General Land.....	5,178.00	0.00	5,178.00
General Office Structures.....	40,177.00	2,348.00	37,829.00
General Office Equipment.....	6,723.00	823.00	5,900.00
General Store and Shop Equipment.....	595.00	76.00	519.00
General Garage Equipment.....	2,129.00	1,292.00	927.00
General Tools and Implements.....	841.00	210.00	631.00
Other General Equipment.....	540.00	0.00	540.00
General Overheads .....	31,992.00	5,249.00	26,743.00
Working Capital and Material and Supplies .....	34,129.00	0.00	34,129.00
Total .....	\$761,939.00	\$94,151.00	\$667,788.00



And the commission, coming now to consider the said complaint and appeal of The Portsmouth Gas Company of and from the said ordinance, passed by the council of the city of Portsmouth, Ohio, on February 24, 1932, fixing and prescribing the maximum prices to be charged for natural gas service for public and private consumption in the city of Portsmouth, Ohio, being fully advised in the premises, and having caused an appraisement to be made and having ascertained and hereinbefore determined and fixed the value of all of the property of said company actually used and useful for the convenience of the public in the furnishing of natural gas for public and private consumption in the said city of Portsmouth, Ohio, excluding therefrom the value of any franchise or right to own, operate or enjoy the same (exclusive of any tax or annual charge actually paid to any political subdivision of the state or county) as consideration for the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger, and having given consideration to the necessity of making reservations from income for surplus, depreciation and contingencies, and having taken into consideration all other matters which were deemed proper, further finds:

That the following adjustments by the elimination of improper system charges and the equalization of maintenance expenses are necessary to determine the actual operating expenses, exclusive of cost of purchased gas, taxes and allowance for depreciation, to determine the cost of the rendering of the service of The Portsmouth

Gas Company for the fiscal years ended February 29, 1932, and February 28, 1933, respectively.

	1932	1933
<b>Transmission and Distribution:</b>		
Operation .....	\$ 30.04*	\$ 121.72*
Maintenance .....	3,716.56*	6,071.94
Commercial Expense .....	14.92*	15.56*
New Business Expense .....	239.96*	223.69*
<b>General Expense:</b>		
Operation .....	20,546.53*	18,957.15*
	<u>\$24,548.01*</u>	<u>\$13,246.18*</u>

\* Figure in red.

That the said city of Portsmouth, Ohio, and the appellant, The Portsmouth Gas Company have agreed that there shall be allowed the appellant herein an earning or return of  $6\frac{1}{2}$  percentum per annum upon the valuation herein found by the commission to be the proper rate base;

That a reasonable annual depreciation allowance to be herein made to said The Portsmouth Gas Company shall be a sum equivalent to one and one-half percentum of the value of its depreciable property;

That, adjusted by the commission as aforesaid, the actual operating expense of the appellant (exclusive of the cost of purchased gas) for the furnishing of its service in the city of Portsmouth, for the aforesaid fiscal

periods, and with the proper allowance for taxes, depreciation ~~and~~ return, is as follows, to wit:

Transmission and Distribution:

	1932	1933
Operation .....	\$ 15,462.00	\$ 16,237.44
Maintenance .....	32,400.90	25,972.45
Commercial Expense .....	19,184.93	19,061.56
New Business Expense .....	16,176.81	10,170.36
General Expense:		
Operation .....	26,081.90	22,991.66
Maintenance .....	1,372.45	1,246.02
	<hr/>	<hr/>
	\$110,709.03	\$ 95,679.49
Taxes .....	20,015.39	20,015.39
Depreciation .....	9,231.13	9,231.13
Return .....	43,406.24	43,406.24
	<hr/>	<hr/>
	\$184,019.15	\$169,918.25

That, for the same fiscal periods, the actual revenues of The Portsmouth Gas Company at the schedule of rates which it has collected under the undertaking duly given herein, were the sums of \$459,560.01 and \$413,035.16, respectively, from which were available, after the payment of the aforesaid operating expenses, taxes, depreciation charges and return, the respective sums of \$276,198.22 and \$244,702.91 for the purchase of gas, or a rate of 33 cents per 1,000 cubic feet:

That, for the same fiscal periods, the revenues of The Portsmouth Gas Company at the schedule of rates fixed and prescribed by said ordinance, would have been the sums of \$305,648.00 and \$275,130.80, respectively, from which, with the same deductions, would have been available for purchase of gas the respective sums of \$121,628.85 and \$105,918.23, or a rate of 14.36 cents per 1,000 cubic feet, and

That, therefore, the rates and charges fixed and prescribed by said ordinance are manifestly unjust, unreasonable and insufficient to yield reasonable compensation for the service of said The Portsmouth Gas Company; ought not to be ratified or confirmed and that reasonable and just rates and charges should be substituted therefor.

The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this commission.

The commission further finds that, in the absence of proof by the United Fuel Gas Company of a just and reasonable rate or charge to be maintained, imposed, charged and collected by it for the furnishing of natural gas to The Portsmouth Gas Company for distribution to consumers for public and private use in said city, it is unable to determine the just and reasonable rates to be substituted for the rates and charges fixed and prescribed by said ordinance which it has found herein to be unjust and unreasonable. It is, therefore,

Ordered, that the said United Fuel Gas Company be, and hereby it is notified, directed and required to proceed, forthwith, and with all diligence to prepare and, within ninety days from the date hereof, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the city of Portsmouth, Ohio, in conformity to the provi-

sions of the general session order of this commission adopted and promulgated under date of March 1, 1934. It is, further,

Ordered, that this matter be continued for the receipt and consideration of such presentation by the United Fuel Gas Company and the making of such further and other order or orders herein as may be necessary and proper in the premises.

The Public Utilities Commission of Ohio,

E. J. Hopple, Chairman,

Charles F. Schaber,

R. D. Williams,

Commissioners.

Dated at Columbus, Ohio, this eighteenth day of April, 1935.

A true copy: /s/ C. H. Knisley, Secretary.



**APPENDIX 2.**

This day, after due notice to all parties in interest, this matter came on to be heard and was heard upon the application of The United Fuel Gas Company, asking, for the reasons and upon the grounds set forth therein, a rehearing with respect to the matters and things decided and determined by the findings and order made and entered herein upon April 18, 1935, and the argument of counsel.

Whereupon, by stipulation of the parties, the city of Portsmouth, Ohio, and The United Fuel Gas Company, it is,

Ordered, that the findings made and entered herein upon April 18, 1935, be, and hereby the same are supplemented with the following additional findings of fact, to wit:

That the gas being delivered to The Portsmouth Gas Company, and which has been delivered to it under the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the state of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line, in a continuous flow from said points of production in West Virginia and Kentucky to a point in the state of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distribution system supplying the town of New Boston, in the state of Ohio, and the city of Ironton, in the state of Ohio, and that the distribu-

tion of natural gas in said town of New Boston and the said city of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company through a distribution system owned by said The United Fuel Gas Company; and

That the United Fuel Gas Company and The Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company of either of said companies, The United Fuel Gas Company and The Portsmouth Gas Company, any such relation, but the two companies are entirely separate and distinct from each other and are so operated.

The commission further finds that the following findings set forth and adopted in said findings as so adopted upon April 18, 1935, to wit:

"The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this commission"

should be, and hereby the same is modified, amended and supplemented to read as follows, to wit:

"The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this commission."

The commission, coming now to consider said application for such rehearing, and being fully advised in the premises, and having hereinbefore, upon the stipulation of said parties, adopted the aforesaid two supplemental findings of fact and amended said findings as aforesaid, finds that sufficient cause has not been made to appear in said application or the argument of counsel for a rehearing upon the said findings, as so supplemented, and the order so made and entered herein as aforesaid. It is, therefore, further,

Ordered, that the said application of said The United Fuel Gas Company, asking, for the reasons and upon the grounds set forth therein, a rehearing with respect to the matters and things decided and determined by the findings (supplemented as aforesaid) and order made and entered herein upon April 18, 1935, be, and hereby the same is denied.

To which order of the commission denying its said application for such rehearing said The United Fuel Gas Company then excepted, here now excepts and its exceptions here are noted of record.

The Public Utilities Commission of Ohio,

E. J. Hopple, Chairman,

Charles F. Schaber,

R. D. Williams,

Commissioners.

(Seal.)

Dated at Columbus, Ohio, this twenty-ninth day of May, 1935.

A true copy: C. H. Knisley, Secretary.

### APPENDIX 3.

**Section 3982. Council may regulate price of electric light, gas and water.** The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them.

**Section 614-44. Power of municipalities to fix rate, price, change, etc.; written complaint; hearing.**

Any municipal corporation in which any public utility is established may, by ordinance, at any time within one year before the expiration of any contract entered into

under the provisions of Sections 3644, 3982 and 3983 of the General Code between the municipality and such public utility with request \* to the rate, price, charge, toll, or rental to be made, charged, demanded, collected, or exacted, for any commodity, utility or service by such public utility, or at any time authorized by law proceed to fix the price, rate, charge, toll or rental that such public utility may charge, demand, exact or collect therefor for an ensuing period, as provided in Sections 3644, 3982 and 3983 of the General Code. Thereupon, the commission, upon complaint in writing, of such public utilities, or upon complaint of one percentum of the electors of such municipal corporation, which complaints shall be filed within sixty days after the passage of such ordinance, shall give thirty days' notice of the filing and pendency of such complaint to the public utility and the mayor of such municipality, of the time and place of the hearing thereof, and which shall plainly state the matters and things complained of.

. . . . .

#### **Hearing upon accepted rates; procedure.**

If any public utility shall have accepted any rate, price, charge, toll, or rental fixed by ordinance of such municipality, the same shall become operative, unless within sixty days after such acceptance there shall have been filed with the commission, a complaint signed by not less than three percentum of the qualified electors of such municipality. Upon such filing, the commission shall forthwith give notice of the filing and pendency of such complaint to the mayor of such municipality and fix a time and place for the hearing thereof. The commission shall, at such time and place, proceed to hear



such complaint, and may adjourn the hearing thereof from day to day.

**Filing complaint held to be consent to continue to furnish produce or service.**

The filing of a complaint by a public utility, as herein provided, shall be taken and held to be the consent of such public utility to continue to furnish its product or service, and devote its property engaged therein to such public use during the term so fixed by ordinance or by the provisions of this act. Parties thereto shall be entitled to be heard, represented by counsel, and to have process to force the attendance of witnesses.

**Section 614-45. Ordinance rate not to be suspended without bond.**

No such complaint or appeal to the commission shall suspend, vacate, or set aside the rate, price, charge, toll or rental fixed by ordinance unless such public utility shall elect to charge the rate, price, charge, toll or rental in force and effect immediately prior to the taking effect of the regulation complained of and appealed from and shall give an undertaking in such amount as the commission shall determine. The undertaking shall be filed with the commission and shall be payable to the state of Ohio for the use and benefit of the consumers affected by the regulation in question. The condition of the undertaking shall be that such public utility shall refund to each of its consumers, public or private, the amount collected by it in excess of the amount which shall finally be determined it was authorized to collect from such consumers. The commission shall make all necessary orders in respect to the form of such undertaking and the manner of making such refunders. Such complaint or appeal to the commission shall suspend,

vacate and set aside all the provisions of the ordinance complained of and appealed from excepting the rate, price, charge, toll or rental fixed thereby.

**Section 614-46. Findings as to rate; valuation of property, etc.**

If the commission, after such hearing, shall be of the opinion that the rate, price, charge, toll or rental, so fixed by ordinance is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the commission shall, with due regard to the value of all the property of the public utility, actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county as a consideration or the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger and to the necessity of making reservations from the income for surplus, depreciation and contingencies, and such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate, price, charge, toll or rental to be charged, demanded, exacted or collected by such public utility, during the period so fixed by ordinance which shall not be less than two years, and order the same substituted for the rate, price, charge, toll or rental so fixed by ordinance or the commission may find and declare that the rate, price, charge, toll or rental, so fixed by ordinance, is just and reasonable, and ratify and confirm the same.

**When effective.**

No such rate, price, charge, toll or rental so determined by the commission shall become effective or valid until after the commission shall have ascertained and determined the valuation upon which such price, charge, toll or rental is based as provided in this act. And such valuation so determined shall be, at all times, open to public inspection. Thereupon the commission shall make inquiry and investigation with respect to the ability of such public utility to furnish its product such period, if it be found that it is able so to do, the commission shall order the public utility in question to continue to furnish the same for the period and at the rate, price, charge, toll or rental so fixed and determined, and such public utility shall continue to furnish its product as provided in such order. If the commission, after the hearing provided for in Sections 614-44 and 614-46 of the General Code shall be of the opinion that any provisions of the ordinance appealed from or complained of other than the rate, price, charge, toll or rental fixed thereby are or will be unjust or unreasonable or that the form and structure of the rate, price, charge, toll or rental fixed thereby may be unfair or unreasonable, or may have the effect of causing any rate, price, charge, toll or rental to be fixed by the commission to become unfair or unreasonable, the commission shall in its order strike out such unjust or unreasonable provisions, conditions, form and structure of said ordinance and shall substitute therefor, if it deem it necessary such provisions and conditions as it may consider fair and reasonable, and make such changes in the form and structure of the rate, price, charge, toll or rental fixed in such ordinance as it may consider fair and reasonable.

**Section 487. The Public Utilities Commission of Ohio; appointment, term, vacancies.** There shall be and there is hereby created a Public Utilities Commission of Ohio and by that name the commission may sue and be sued. The Public Utilities Commission shall consist of three members, who shall be appointed by the governor with the advice and consent of the senate, and shall possess the powers and duties herein specified as well as all powers necessary and proper to carry out the purposes of this chapter. Immediately after this act shall take effect, the governor shall, with the advice and consent of the senate, appoint a member whose term shall expire on the first day of February, 1915; another whose term shall expire on the first day of February, 1917, and another whose term shall expire on the first day of February, 1919; and thereafter each member shall be appointed and confirmed for a term of six years. Vacancies shall be filled in the same manner for unexpired terms. One of such commissioners, to be designated by the governor, shall, during the term of the appointing governor, be the chairman of the commission. Not more than two of said commissioners shall belong to or be affiliated with the same political party.

**Section 614-2. Definitions.** The following words and phrases used in this chapter unless the same is inconsistent with the text, shall be construed as follows:

The term "commission" when used in this act, or in chapter one, division two; title three, part first of the General Code (Section 487 et seq.) and the acts amendatory or supplementary thereto means "the public utilities commission of Ohio."

The term "commissioner" means one of the members of such commission.

Any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

. . . . .

When engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers within this state, is a natural gas company, or when engaged in the business of supplying natural gas to gas companies or to natural gas companies within this state, is a natural gas company; provided that a producer supplying to one or more gas or natural gas companies, only such gas as shall be produced by such producer from wells drilled on land owned in fee by such producer or where the principal use of such land by said producer is other than the production of gas, within this state, shall not thereby become a natural gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas company providing for the supply of natural gas and for compensation for the same, shall be subject to the jurisdiction of the commission whether or not such rates, rentals, tolls, schedules, charges or agreements shall have been agreed upon or put into effect prior to the taking effect of this provision; provided, however, that authority be and hereby is granted to The Public Utilities Commission of Ohio, upon application made to it, to relieve any producer of natural gas, hereinbefore defined as a gas company or a natural gas company, of compliance with the obligations imposed by this chapter, so long as such producer be not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural



gas, or so long as such producer does not engage in the distribution of natural gas to consumers;

When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partly within this state, is a pipe line company;

. . . . .

**Section 614-2a. Defining "public utility."**

The term "public utility" as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit, and except such "public utilities" as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as "railroads" in General Code Sections 501 and 502, and these terms shall apply in defining "public utilities" and "railroads" wherever used in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplemental thereto or in this act.

**Section 614-3. Powers and jurisdiction to supervise and regulate public utilities and railroads.**

The Public Utilities Commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate "public utilities" and "railroads" as herein defined and provided and to require all public utilities to furnish their products and render all services exacted by the commission, or by law, and also to promulgate and enforce all orders relating to the protection, welfare and safety of railroad employees and the traveling public.

**Section 614-4. Scope of jurisdiction.** The jurisdiction, supervision, powers and duties of the public service commission shall extend to every public utility and rail-

road, the plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state, and to the persons or companies owning, leasing or operating the same, and to the records and accounts of the business thereof done within this state.

**Section 614-6. Examination of witnesses and production of records.** The commission shall have power, either through its members or by inspectors or employes duly authorized by it, to examine under oath, at any time and for assisting the commission in the performance of any powers or duties of the commission, any officer, agent or employe of any public utility or railroad or any other person, in relation to the business and affairs of such utility and to compel the attendance of such witness for the purpose of such examination. In case of disobedience on the part of any person or persons to comply with any order relating to the production or examination of books, contracts, records, documents and papers or in case of the refusal of any person to testify to any matter regarding which he may be lawfully interrogated by any such member, employe or inspector of the commission at any time or place, it shall be the duty of the Common Pleas Court of any county or any judge thereof, on application of any member of the commission, to compel obedience by contempt proceedings as in the case of the disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein.

**Section 614-7. Examination of records.** The commission shall have power, either through its members or by inspectors or employes duly authorized by it, to examine all books, contracts, records, documents and papers of

any public utility, and by subpoena duces tecum to compel the production thereof, or of duly verified copies of the same or any of them, and to compel the attendance of such witnesses as the commission may require to give evidence at such examination.

**Section 614-8. General supervision.** The commission shall have general supervision over all public utilities within its jurisdiction as hereinbefore defined, and shall have the power to examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, and also with respect to the safety and security of the public and their employes, and with respect to their compliance with all provisions of law, orders of the commission, franchises and charter requirements. The commission, either through its members or inspectors or employes, duly authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device and lines of any public utility.

**Section 614-9. May require copy of contract.** Every public utility shall file with the commission, when and as required by it, a copy of any contract, agreement or arrangement, in writing, with any other public utility relating in any way to the construction, maintenance or use of its plant or property, or any service, rate or charge.

**Section 614-12. Unreasonable charge prohibited.** Every public utility shall furnish necessary and adequate service and facilities which shall be reasonable and just,

and every unjust or unreasonable charge for such service is prohibited and declared to be unlawful.

**Section 614-15. Undue advantage.** No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

**Section 543. Rehearing; who may have.** After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unreasonable or unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied. Any application for a rehearing made within less than ten days before the effective date of the order

as to which a rehearing is sought, and not granted within twenty days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application.

**Time of hearing, when granted without suspension of order.** If an application for a rehearing be granted without suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the same within twenty days after final submission and if such determination is not made within said time, it may be taken by any party to the rehearing that the order involved is affirmed. An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct. If, after such rehearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change or modify the same. An order or decision made after such rehearing, abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.



**Section 544. Order may be reversed.** A final order made by the commission shall be reversed, vacated or modified by the Supreme Court on appeal, if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable.

**Section 545. Notice of appeal seeking reversal, vacation or modification.** The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the commission by any party to the proceeding before the commission, against The Public Utilities Commission of Ohio, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless the same is duly waived, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by cross-appeal.

**Section 548. Stay of execution.** No proceeding to reverse, vacate or modify a final order rendered by the commission shall operate to stay execution thereof unless the Supreme Court or a judge thereof in vacation, on application and three days' notice to the commission, shall allow such stay, in which event the appellant shall be required to execute an undertaking, payable to the state of Ohio, in such a sum as the court may prescribe, with surety to the satisfaction of the clerk of the Supreme Court, conditioned for the prompt payment by the appellant of all damages arising from or caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm or corporation for transportation, transmission, produce, commodity or service in excess of the charges

fixed by the order complained of, in the event such order be sustained.

Section 538: **Commission may rescind or amend an order.** Upon application of any person or any railroad and after notice to the parties in interest and opportunity to be heard as provided in this chapter for other hearings, has been given, the commission may rescind, alter or amend an order fixing any rate or rates, fares, charges or classification, or any other order made by the commission. Certified copies of such order shall be served and take effect as provided for original orders.

**APPENDIX 4.****In the United States District Court, Southern District of  
Ohio, Eastern Division.**

No. 1141 In Equity. (Columbus)—United Fuel Gas Company, Plaintiff, vs. The Public Utilities Commission, et al., Defendants.

**Decision.**

(October 2, 1941.)

Before Allen, Circuit Judge, and Nevin and Underwood,  
District Judges.

**Per Curiam:**

Plaintiff, a West Virginia corporation, is a producer and purchaser of natural gas in that state. Defendants are The Public Utilities Commission of Ohio (hereinafter called the commission); certain named state officials acting for it and on its behalf; the city of Portsmouth, Ohio, and Portsmouth Gas Company, an Ohio corporation. Due to their tenure of office and for various reasons changes have occurred from time to time in respect to individual defendants but proper substitutions have been made.

In 1931 plaintiff entered into a contract with defendant, Portsmouth Gas Company, for sale to that company of a supply of natural gas which Portsmouth Gas Company in turn sold and distributed to its customers in Portsmouth, Ohio. Portsmouth Gas Company is not a producer of natural gas and has no available gas of its own. That contract ran for five years. It expired on November 1, 1936. Prior to its expiration, the date thereof was extended, however, to November 1, 1937 (amended complaint and stipulation of parties both filed

November 20, 1936), and thereafter to November 1, 1941 (second amended complaint filed March 8, 1939, and third amended complaint filed April 8, 1941).

After the two gas companies had entered into their contract, the city of Portsmouth passed an ordinance fixing certain rates for the distribution of natural gas in that city. Not content with those rates, the Portsmouth Gas Company appealed to The Public Utilities Commission of Ohio. For its determination of the question presented, the commission found that it was necessary to bring plaintiff herein into the proceedings before it, and it was so ordered.

Plaintiff appeared before the commission and moved to be dismissed but its motion was denied.

After a hearing, the commission found on April 18, 1935, that the rates fixed by the city ordinance of the city of Portsmouth "are manifestly unjust, unreasonable and insufficient to yield reasonable compensation" to the Portsmouth Gas Company, and it further found and ordered on said date, as follows:

"The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefor are subject to the jurisdiction of this commission.

"The commission further finds that, in the absence of proof by The United Fuel Gas Company of a just and reasonable rate or charge to be maintained, imposed, charged and collected by it for the furnishing of natural gas to The Portsmouth Gas Company for distribution to consumers for public and private use in said city, it is unable to determine the just and reasonable rates to be substituted for the rates and charges fixed and prescribed by said ordinance

which it has found herein to be unjust and unreasonable. It is, therefore,

"Ordered, that the said United Fuel Gas Company be, and hereby it is notified, directed and required to proceed, forthwith, and with all diligence to prepare and, within ninety days from the date hereof, to complete a presentation of all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to The Portsmouth Gas Company for the furnishing of natural gas for distribution within the city of Portsmouth, Ohio, in conformity to the provisions of the general session order of this commission adopted and promulgated under date of March 1, 1934. \* \* \*"

On May 14, 1935, plaintiff herein filed a "petition for rehearing" before the commission on the order, in so far as it was affected thereby, entered on April 18, 1935.

Subsequently, to wit: on May 29, 1935, the commission denied this application for a rehearing and its order of April 18, 1935, was left in full force and effect. However, along with its denial of the application and in the same order, the commission ordered as follows:

"That the findings made and entered herein upon April 18, 1935, be, and hereby the same are supplemented with the following additional findings of fact, to wit: That the gas being delivered to The Portsmouth Gas Company, and which has been delivered to it under the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the states of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the state of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distri-



bution system supplying the town of New Boston, in the state of Ohio; and the city of Ironton, in the state of Ohio, and that the distribution of natural gas in said town of New Boston and the said city of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company; and:

"That The United Fuel Gas Company and The Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company and The Portsmouth Gas Company, any such relation, but the two companies are entirely separate and distinct from each other and are so operated.

"The commission further finds that the following findings set forth and adopted in said findings as so adopted upon April 18, 1935, to wit:

"The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio, and that the rates to be charged therefore are subject to the jurisdiction of this commission' should be, and hereby the same is modified, amended and supplemented to read as follows, to wit:

"The commission further finds that the furnishing of natural gas by The United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the city of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefore are subject to the jurisdiction of this commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this commission.'

"Thereafter, on July 3, 1935, plaintiff filed its bill of complaint herein praying, for the reasons alleged

in the bill, inter alia, 'That the orders of said The Public Utilities Commission of Ohio of April 18, 1935, and May 29, 1935, requiring this plaintiff to prove the cost of producing and delivering the natural gas furnished by it to the defendant Portsmouth Gas Company be declared null and void and of no effect,' and that the commission and certain of the defendants, acting for it and on its behalf 'be enjoined, inhibited and restrained from regulating or attempting to regulate the transactions between this plaintiff and the said defendant Portsmouth Gas Company under the contract referred to herein, and that, pending the determination of its right to such permanent injunction, an interlocutory injunction be granted in accordance with the foregoing."

Plaintiff prayed also for a temporary restraining order and, on July 3, 1935, a temporary restraining order as prayed for was signed and issued by the late Hon. Benson W. Hough,<sup>1</sup> then United States District Judge for the Southern District of Ohio.

In its bill of complaint, plaintiff sets out several reasons upon any or all of which it claims it is entitled to the relief prayed for.

At the outset and primarily, however, it challenges the jurisdiction of the commission, claiming that the commission "is without any jurisdiction to make such orders or requirements of this plaintiff"; and "that the statute under which it is acting, giving it such power as construed by it, violates the commerce clause of the Constitution of the United States . . ."

In their answer, filed July 30, 1935, the commission and the other defendants named herein as acting for

<sup>1</sup> Subsequently, the cause came on for hearing and argument before a statutory three-judge court, of which Judge Hough was a member. Judge Hough died, however, before the case was decided necessitating a re-argument at a later date before the three-judge court, as now constituted.

and in its behalf assert that the commission does have jurisdiction; that the statute referred to is constitutional, and that the orders and directions of the commission are in all respects proper and according to law.

On September 23, 1935, a stipulation, signed by counsel for the respective parties thereto, was filed, reading as follows:

"It is stipulated by the parties hereto that the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, a copy of which is filed as Exhibit G with the bill, are the facts in regard to the natural gas and its movement pertinent to the consideration of the question involved in this case and the said findings of fact by the said The Public Utilities Commission may be treated by the court as admissions of the parties in regard thereto \* \* \*."

On November 20, 1936, plaintiff filed an amended bill of complaint and on March 8, 1939, its second amended and supplemental bill of complaint, praying in each instance as in its original bill.

On March 10, 1939, a stipulation, signed by all the parties, was filed herein, reading as follows:

"It is hereby stipulated by the parties to this proceeding that the facts stated in the second amended bill of complaint herein are true and may be considered by the court as having been proven herein. This does not apply to conclusions of law."

On April 8, 1941, plaintiff filed a third amended and supplemental bill of complaint reiterating therein the prayer of its original and amended bills.

On April 24, 1941, defendants, Public Utilities Commission of Ohio, George C. McConnaughey, chairman of said commission, Dennis F. Dunlavy and Harry M.

Miller, members, Thomas J. Herbert, attorney general of the state of Ohio, and Kenneth L. Sater, special counsel for said commission, filed a motion to dismiss the third amended bill of complaint for the reasons and on the grounds set forth in the motion. This motion was overruled on July 3, 1941.

On July 28, 1941, defendants filed an application for leave to file their answer to plaintiffs' third amended and supplemental complaint. On August 4, 1941, leave was granted defendants so to do, and on the same day, to wit, August 4, 1941, defendants filed their answer.

The cause is now before the court on plaintiff's third amended and supplemental bill of complaint; defendants' answer thereto (just referred to) and the record, including the stipulation (above) of the parties as to the facts, which as alleged in the third amended bill are in substance the same as stated in the second amended bill (and in the original bill and amended bill as well, except for a reference to the "National Gas Act" in the second amended bill), except that it is recited in the third amended complaint that the contract between plaintiff and defendant, Portsmouth Gas Company, referred to in the second amended complaint has been continued by the parties thereto "upon the same terms and conditions as provided by said last extension."

In their brief (pp. 5-6), counsel for the commission and those defendants acting for it and on its behalf say, "It may be conceded upon the basis of the record taken before the commission that the transportation into the state of Ohio by pipe lines of gas produced by the plaintiff in West Virginia and Kentucky is interstate commerce. It may be further conceded that the primary power to regulate the transportation of gas in interstate

commerce rests with the Congress of the United States and that the Congress of the United States has not yet seen fit to exercise that power. It may be admitted further that if the mere fact that the transportation of such gas in interstate commerce precludes the state from exercising any jurisdiction thereover despite the fact that Congress has not seen fit to exercise its powers, and despite the fact that the exercise of such jurisdiction may be necessary in the interests of local regulation and despite any other facts which may be presented in a particular case, then The Public Utilities Commission of Ohio has no jurisdiction over the United Fuel Gas Company in the case that is here presented.

"On the other hand, if the interstate transportation of gas does not of itself preclude state regulation in a proper case where the nature of the regulation is primarily local in character, and where it is essential to the exercise of the regulatory functions of a public service commission, and where the particular facts of the case warrant the exercise of the power conferred by the legislative enactment in the state in question, and where Congress has failed to exercise its paramount authority, then the orders of The Public Utilities Commission of Ohio which are here sought to be enjoined may be sustained."

The sale and delivery of natural gas to the Portsmouth Gas Company is thus clearly interstate commerce, and compilation of voluminous data has been demanded for use in a proceeding by the state commission to determine the fair and reasonable rate to be collected by the local distributing company with which the plaintiff has contracted to sell its product and services for a definite period at a definite price. The two contracting parties



are entirely separate and distinct from each other and are so operated. In view of such relationship and the nature of the inquiry before the Ohio commission it is believed that the jurisdiction sought to be asserted falls outside the orbit of state regulation now permissible.

Since this suit was instituted, the Congress of the United States, to wit, on June 21, 1938, passed an act known as the "Natural Gas Act" entitled, "An Act to regulate the transportation and sale of natural gas in interstate commerce, and for other purposes." Title 15, Section 717, U. S. C. A., c. 556, Section 1, 52 Stat., 821. Among others, the Natural Gas Act contains the following provisions:

"Section 1 (b). The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

"Section 4 (a). All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the commission . . . shall be just and reasonable . . ."

"Section 5 (a). Whenever the commission . . . shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company . . . subject to the jurisdiction of the commission . . . is unjust, unreasonable, unduly discriminatory, or preferential, the commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . ."

"Section 5 (b). The commission upon its own motion, or upon the request of any state commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the commission has no authority to establish a rate governing the transportation or sale of such natural gas."

"Section 6 (a). The commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

"(b). Every natural-gas company upon request shall file with the commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the commission informed regarding the cost of all additions, betterments, extensions, and new construction."

Natural Gas Pipe Line Co. v. Slattery, 302 U. S., 300, held a state statute which demands access to books and accounts of a pipe line company selling natural gas in interstate commerce and requires production of the information sought, to be not unconstitutional. That case involved a transaction between public utilities which were affiliates. Here the plaintiff and the defendant the Portsmouth Gas Company are conceded by the defendant commission to have no connection with each other by way of interlocking directorates, unity of interest, or affiliation. They are entirely separate and distinct from each other and are so operated. Their dealings were and are at "arm's length." Cf. Natural Gas Pipe Line Co. v. Slattery, *supra*, at 306. This is an important distinction and completely differentiates the operation

herein involved, from that held to be subject to examination in the Slattery case. However, it is not the sole differentiating feature between the two cases, for the Slattery case was decided prior to the enactment of the "Natural Gas Act," supra, the provisions of which, in our opinion, compel the issuance of the injunction prayed for.

Regardless of the right or jurisdiction of the Ohio commission to issue the orders herein complained of on April 18, 1935, and May 29, 1935, it was deprived of any further jurisdiction by the passage of the Natural Gas Act on June 21, 1938. The transactions involved are squarely covered by the Natural Gas Act, constituting as they do "the sale in interstate commerce of natural gas for resale for ultimate public consumption" (Section 1(b)). Under this statute The Public Utilities Commission of Ohio might have filed a complaint charging that the rates made by the United Fuel Gas Company in the sale of its gas to the Portsmouth Gas Company are unjust, unreasonable, or unduly discriminatory or preferential, and the federal commission thereupon would have been empowered to determine the just and reasonable contract rate to be thereafter observed and enforced. Section 5 (a). The Federal Power Commission is required to "make available" to the Ohio commission such information and reports as may be of assistance in state regulation, and may upon request from the Ohio commission make available as witnesses any of its own trained experts. Section 17 (c). We think that these provisions are significant.

Prior to the enactment of the Natural Gas Act it was permissible for the state to regulate local features of interstate commerce in gas. *Pennsylvania Gas Co. v.*

Public Service Commission, 252 U. S., 23, 29; East Ohio Gas Co. v. Tax Commission of Ohio, 283 U. S., 465. Since the federal statute has been enacted, giving to the Federal Power Commission the power to fix the contract rate between plaintiff and the Portsmouth Gas Company, the Congress has occupied the field and the power is exclusive in the Federal Power Commission. The right to conduct investigations as to contracts for sale of gas in interstate commerce, which is an incident to the rate-making power, is also exclusively confided to the Federal Power Commission. We conclude that since the passage of the Natural Gas Act the Ohio commission and these defendants acting for it and on its behalf have been and are without legal right or authority to enforce the orders of the commission entered April 18, 1935, and May 29, 1935.

Upon the record here the court finds, therefore, that an interlocutory injunction should be granted enjoining defendant, The Public Utilities Commission of Ohio and each and all other defendants herein acting for it or on its behalf from enforcing or seeking to enforce, or execute, the orders of the commission entered by it on April 18, 1935, and May 29, 1935, against plaintiff herein.

The court adopts as its findings of fact herein, the findings of fact by The Public Utilities Commission of Ohio as contained in its order of May 29, 1935, to the extent and as set forth and referred to by the parties to the stipulation filed herein on September 23, 1935.

Each party to pay its own costs.

Counsel may prepare and submit an order accordingly.

**APPENDIX 5.**

This cause came on to be heard upon the original bill and exhibits therewith filed, and upon the several amended and supplemental bills, the answer of the several defendants, the agreed statement of facts, and all orders heretofore made and entered herein; and the parties having offered nothing further in support of their respective contentions the case is submitted for final decision; from all of which matters so submitted, the court is of the opinion, for reasons stated in writing and filed with the record herein, that the plaintiff is entitled to the relief prayed for in its original and amended and supplemental bills.

It is therefore adjudged, ordered and decreed that the defendant, Public Utilities Commission of Ohio, and each and all other defendants herein acting for it or on its behalf be and they hereby are enjoined from enforcing or seeking to enforce against the plaintiff the orders of said The Public Utilities Commission of Ohio entered by it April 18, 1935, and May 29, 1935, which orders are exhibited with the plaintiffs' bill filed herein.

Each party shall pay its own costs.

To all of which defendants jointly and severally except, and their exceptions are hereby noted of record.







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CHARLES ELMORE CHAPLEY  
CLERK

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1941**

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**No. 1216** 87

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**THE PUBLIC UTILITIES COMMISSION OF OHIO,  
GEORGE McCONNAUGHEY, CHAIRMAN OF SAID COM-  
MISSION, ET AL.,**

*Appellants,*

*vs.*

**UNITED FUEL GAS COMPANY, ET AL.**

---

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF OHIO.**

---

**MOTION TO DISMISS OR AFFIRM.**

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✓ **HAROLD A. RITZ,**

**FREEMAN T. EAGLESON,**

*Counsel for Appellee.*



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**IN THE DISTRICT COURT OF THE UNITED STATES,  
SOUTHERN DISTRICT OF OHIO,  
EASTERN DIVISION**

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In Equity. No. 1141.

---

**UNITED FUEL GAS COMPANY,**

*Plaintiff,*

*vs.*

---

**PUBLIC UTILITIES COMMISSION OF OHIO, ET ALS.,**

*Defendants.*

---

**MOTION OF UNITED FUEL GAS COMPANY, UNDER  
RULE 12, PARAGRAPH 3, TO DISMISS THE AP-  
PEAL ALLOWED OR IN THE ALTERNATIVE TO  
AFFIRM THE JUDGMENT OF THE DISTRICT  
COURT.**

---

Respondent, United Fuel Gas Company, moves to dis-  
miss the appeal granted herein or to affirm the judgment  
of the District Court.

Petitioner, Public Utilities Commission of Ohio, under-  
took to regulate the rates at which this respondent was  
selling natural gas to the Portsmouth Gas Company. (See  
Exhibits E and G with the bill of complaint.) This suit  
was instituted by this respondent for the purpose of en-  
joining the said Public Utilities Commission of Ohio from  
enforcing said order upon the grounds that the business

between it and the said Portsmouth Gas Company was interstate commerce and beyond the power of the petitioner, Public Utilities Commission of Ohio, to regulate. The case was heard in the District Court and an injunction granted, prohibiting said Commission, its members and agents, from enforcing said orders against this respondent, and this appeal is prosecuted from that judgment.

In their assignment of errors, the petitioners base their challenge to the judgment complained of on the ground that the commerce involved is not interstate, and that the parties to the contract involved in the case did not deal at arms length. These contentions are directly contradictory to the express finding of the Commission itself in its order of May 29, 1935, Exhibit G with the bill; and upon the facts found in this order the District Court expressly found that the delivery of this gas is clearly interstate commerce and that the parties are entirely separate and distinct from each other.

As stated in the opinion of the court below, the petitioners here upon the hearing conceded that the natural gas involved was interstate commerce. To say the least, it would seem inconsistent for petitioners now to challenge the judgment of the court because it accepted this concession.

In view of these specific findings by the District Court, it would seem that the claims that the petitioners make for reversal of the Judgment of the court below must fall.

This appeal should be dismissed, or in the alternative, the judgment of the court below affirmed, because the natural gas involved was interstate commerce and the regulation of it was beyond the power of the petitioner, Public Utilities Commission of Ohio.

*Public Utilities Commission v. London*, 249 U. S. 236;  
*East Ohio Gas Co. v. Tax Commission of Ohio*, 283  
 U. S. 465;

*United Fuel Gas Company v. Hallanan*, 257 U. S. 277;  
*Pennsylvania v. West Virginia*, 262 U. S. 553;  
*State of Missouri, ex rel. Barrett, v. Kansas Natural Gas Company*, 265 U. S. 298;  
*Peoples Natural Gas Company v. Public Service Commission of Pennsylvania*, 270 U. S. 550;  
*Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U. S. 83.

The application of these cases to the facts found by the Commission and the District Court clearly justifies the conclusion of the Court that "in view of such relationship and the nature of the inquiry before the Ohio Commission, it is believed that the jurisdiction sought to be asserted falls outside the orbit of State regulation now permissible."

It is true that the granting or refusal of an injunction is to some extent discretionary with the Court of first instance.

*Di Giovanni v. Kansas Fire Insurance Company*, 296 U. S. 64;  
*Petroleum Company v. Public Service Commission of Kentucky*, 304 U. S. 209.

This discretion of the trial court will not be disturbed unless there is clear abuse thereof. No such abuse appears in this case. To have permitted the Commission to enforce its order would have entailed the expenditure on the part of this respondent of a considerable sum of money in compiling matters of which the Commission could make no legal use, and the Court, therefore, very properly exercised its discretion to prevent such useless expenditures. The order of the Commission would have required this respondent to do a perfectly vain thing.

The court below discussed at some length the application of the Natural Gas Act to the situation and held that

the transaction involved fell within the jurisdiction of the Federal Power Commission. Regardless of the application of the Federal Natural Gas Act, the Court was justified in granting the injunction. That the commerce affected falls within the purview of the Federal Natural Gas Act is clear from recent decisions.

*Federal Power Commission v. Natural Gas Pipe Line Company*, decided March 16, 1942, 86 L. Ed. 699; *Illinois Natural Gas Company v. Central Illinois Public Service Company*, decided January 5, 1942, 86 L. Ed. 322.

Because the principles involved in this case have been so frequently decided by this Court in the decisions above cited, in accordance with the conclusion reached by the court below, it is respectfully submitted that the appeal should be dismissed, or in the alternative, that the judgment complained of should be affirmed.

HAROLD A. RITZ,

FREEMAN T. EAGLESON,

*Attorneys for United*

*Fuel Gas Company.*







**FILE COPY**

**NO. 87**

SEP 19 1942

CHARLES W. WIRE & SONS  
CLEVELAND

**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, 1942**

**THE PUBLIC UTILITIES COMMISSION OF OHIO, GEORGE MC-  
CONNAUGHEY, CHAIRMAN OF SAID COMMISSION, ET AL.,**  
*Appellants,*

**vs.**

**UNITED FUEL GAS COMPANY ET AL.,** *Appellees.*

**BRIEF FOR APPELLEE UNITED FUEL GAS  
COMPANY.**

✓ **HAROLD A. RITZ,**  
**Charleston, W Va.,**

✓ **FREEMAN T. EAGLESON,**  
**Columbus, Ohio,**  
*Counsel for Appellee,*  
*United Fuel Gas Co.*



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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1942

NO. 87

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THE PUBLIC UTILITIES COMMISSION OF OHIO, GEORGE MC-  
CONNAUGHEY, CHAIRMAN OF SAID COMMISSION, ET AL.,  
*Appellants,*

*vs.*

UNITED FUEL GAS COMPANY ET AL., *Appellees.*

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**BRIEF FOR APPELLEE UNITED FUEL GAS  
COMPANY**

This suit was instituted by the appellee United Fuel Gas Company in the District Court of the United States for the Southern District of Ohio for the purpose of having a determination and declaration of the rights of the parties arising under a contract between the said United Fuel Gas Company and the Portsmouth Gas Company for the sale of natural gas to the latter Company by the former, at the City of Portsmouth, Ohio, and to have the appellant Commission enjoined from determining what price the said United Fuel Gas Company should charge for said natural gas. The court below, after a full hearing, determined that the appellant Public Utilities Com-

mission of Ohio had no jurisdiction over the subject-matter involved and enjoined it from further proceeding against this appellee.

### STATEMENT OF THE CASE.

United Fuel Gas Company is a corporation engaged in the business of producing, buying, transporting and selling natural gas, both to retail consumers and to other companies engaged in distributing it to such consumers. The Portsmouth Gas Company is engaged in the business of distributing natural gas to domestic and industrial consumers in the City of Portsmouth, Ohio. There is no connection, either by way of interlocking directors or unity of interest, between the said United Fuel Gas Company and the said Portsmouth Gas Company, nor is there any such relation between any associate or affiliate of any of said companies (R. p. 38).

On the 22nd day of October, 1931, a contract was entered into between the said United Fuel Gas Company and the Portsmouth Gas Company, by which the former Company agreed to sell and did sell to the latter Company a supply of natural gas for its requirements (R. pp. 12-16). This contract, by its terms, was to continue in force for the term of five years, but before the expiration of said time, the same was continued by agreement of the parties, from time to time, the last of said extensions being on the 26th day of October, 1938 (R. p. 50), by which said contract was continued in force for one year from November 1st of that year, or until a new contract was concluded: Under the terms of this contract and extensions thereof this appellee has been furnishing natural gas to the said Portsmouth Gas Company and is still doing so.

On the 24th day of February, 1932, the Council for the City of Portsmouth passed an ordinance fixing the rate at which the said Portsmouth Gas Company should sell



gas to its consumers in said city (R. pp. 17-18). From this ordinance the said Portsmouth Gas Company appealed to the Public Utilities Commission of Ohio, asserting that the rate fixed by the said City of Portsmouth was unreasonable and confiscatory, and under the provisions of the laws of the State of Ohio, gave bond and elected to charge the rate then in force, pending the determination of said appeal (R. p. 18).

Upon this appeal the said City of Portsmouth filed a petition in which it contended that the rates charged to consumers in the City of Portsmouth were unreasonable and excessive, and that the reason therefor was because the rate charged to the Portsmouth Gas Company by the United Fuel Gas Company was excessive, and moved the Commission to make the said United Fuel Gas Company a party to the proceeding and determine what would be a proper rate to be charged by the said United Fuel Gas Company to the Portsmouth Gas Company for the gas furnished by it (R. pp. 17-22). The said Public Utilities Commission thereupon summoned the said United Fuel Gas Company to show cause why it should not be made a party to the proceeding and such action taken therein as was prayed for in the petition of the said City of Portsmouth. In response to this order this appellee made answer and denied that the said Public Utilities Commission had any jurisdiction of the matters involved or any power to regulate the rates between the said Portsmouth Gas Company and this appellee, and asked that it be dismissed from said proceeding (R. pp. 22-27). This matter was heard before the Commission, and resulted in the Commission entering an order denying the motion to dismiss this appellee from said proceeding and making it a party thereto (R. pp. 27-29).

The said Public Utilities Commission thereupon proceeded to hear the case presented, and found that the rates being charged by the said Portsmouth Gas Com-

pany were not unreasonable and that the rate fixed by the City of Portsmouth in its ordinance was unreasonable and confiscatory, if the price paid for gas by the said Portsmouth Gas Company to this appellee was a proper price, and determined that it could not finally decide what would be a proper rate until it had fixed a rate between the said Portsmouth Gas Company and this appellee, and required this appellee to forthwith proceed to produce before it all pertinent and proper evidence to show what would be a proper rate to be charged by it to the said Portsmouth Gas Company (R. pp. 30-35).

Thereupon this appellee tendered a petition for rehearing, in which it again asserted that the said Public Utilities Commission of Ohio had no jurisdiction over the transaction between it and the said Portsmouth Gas Company. In this petition it asked said Commission to specifically declare that it (the said Commission) has or has not the power to regulate the price and that it intends to or does not intend to regulate the price and fix the same, and that it has or has not the right to compel this petitioner to continue to furnish gas to the Portsmouth Gas Company at such rate as may be fixed by the said Public Utilities Commission of Ohio, and that it intends to compel this petitioner to furnish such gas at such rate as it may prescribe, or that it does not intend to do so (R. pp. 35-37).

In answer to this petition for rehearing the said Commission entered an order (R. pp. 37-39), in which it more specifically found the facts upon which its conclusions were based, and also declared that the transaction between this appellee and the Portsmouth Gas Company was a public service which it (the said Commission) had the power to regulate, and that it intended to so regulate the price charged for said natural gas.

For convenience, the specific findings of fact in said order are set out as follows:

declared that the making of rates to be charged for services rendered in interstate commerce is beyond the power of local authorities. *State of Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Comm. v. Landon*, 249 U. S. 236; and particularly the case of *Public Utilities Comm. of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U. S. 83. In more than one of these cases this court has declared that the fact that Congress has not acted to regulate the matters involved amounts to a declaration on the part of the Congress of the United States that it does not intend that the same shall be regulated.

The appellants also contend that appellee sells gas to other companies at a less rate than that charged here. The examples there given are not extracted from anything in this record, nor is there anything to indicate that the conditions under which the deliveries are made to those other companies are at all similar to the conditions involved here. For instance, the appellants do not advise the court that the deliveries which they propose to compare are made at a point practically on the perimeter of the gas-producing area more than one hundred miles distant from the point of delivery in this case, nor do they indicate that the quantity of gas involved there is very substantially different from the quantity involved in this case, nor does it appear whether or not the deliveries made in the instances referred to are with more or less regularity than the deliveries involved here. Many other elements would have to appear before the comparison would be of any value. Such a comparison, to mean anything, would have to include a showing that all the conditions were substantially similar in each case.

Appellants also argue that because this appellee, in its answer before the Public Utilities Commission, stated that it did not question the right of the Commission to call upon it for any evidence which it might have available

to show what would be a proper rate to allow the Portsmouth Gas Company to charge in its rates, but it did deny the power of the Commission to compel this appellee, at great expense, to compile evidence, and it also challenged the right of the Commission to prescribe the rate at which appellee should sell gas to the Portsmouth Gas Company. Of course, it is apparent that the action of this appellee in that regard was no more than a recognition of the right of the Commission to secure any proper evidence it might desire in fixing the rates to be charged to the consumers of the City of Portsmouth. If the Portsmouth Gas Company agreed to pay a grossly excessive rate to this appellee for its supply of gas, it might be that the Commission could hold that it would not be justified in allowing it anything more than what it considered to be reasonable. In the case of *Public Utilities Comm. v. Landon*, *supra*, the point was made there that the supplying company had entered into a contract, the effect of which was to give it too little for the gas supplied. This court said that this was a matter about which the parties had a right to contract, and if they made an improvident contract, the loss must be theirs. And so in the case of *Public Utilities Comm. of Rhode Island v. Attleboro Steam & Elec. Co.*, *supra*, the contention was made that the contract furnished inadequate compensation for the service rendered. This court, however, held that that was a matter which the parties had agreed on, and if they made an improvident contract, they must suffer the loss. The argument was made there that it would have the effect of throwing a burden on other consumers to make up the loss sustained through furnishing the service involved, but the court said that this did not follow, that the loss must be sustained by the stockholders of the company who were responsible for the improvident contract. And so here, even though it be considered that the contract made by the Portsmouth Gas Company with this appellee

was an improvident contract, no relief could be given by local authorities against the same, in so far as the Portsmouth Gas Company was concerned, but, under the holdings of the cases above referred to, the result of such improvidence must fall upon the stockholders of the Company. The Public Utilities Commission would have the right to fix what a fair rate for natural gas would be in the City of Portsmouth, and if this fair rate when fixed did not furnish the Portsmouth Gas Company with funds sufficient to pay for its supply of gas under the contract, then the stockholders of the Company must bear the loss thus entailed. This appellee, therefore, in its answer expressed its entire willingness to aid the Public Utilities Commission in every way it could in furnishing evidence of what a fair rate would be, without submitting itself to regulation by that Commission in regard to this transaction.

**THE COURT BELOW HAD JURISDICTION AND PROPERLY EXERCISED THAT JURISDICTION IN GRANTING THE RELIEF WHICH IT DID.**

Some suggestion has been made by the appellants that the court below had no jurisdiction of this case because of what is known as the "Johnson Act." (28 U. S. C. A. Sec. 41 as amended). There is a clear exception in the "Johnson Act" to the effect that where the controversy involves the regulation of interstate commerce (which is the case here), it does not apply.

The pertinent provisions of that Act are:

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision



thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

It will be seen that the "Johnson Act" has no application where the claim is that the order complained of is a regulation of interstate commerce, as is the case here.

This case, we submit, comes clearly within the provisions of the Declaratory Judgment Act (Title 28, USCA, 400). There is a clear controversy here between the appellants and this appellee. The appellants insist that the Public Utilities Commission of Ohio has the power to determine the price which this appellee shall charge for natural gas sold by it to the Portsmouth Gas Company, while this appellee contends that it (the Commission) has no such power. It is difficult to picture a clearer case of actual controversy. The Public Utilities Commission declares that it will proceed to determine what rate this appellee shall be allowed to charge, and make it accept that rate. As to when jurisdiction will be sustained under the Declaratory Judgment Act is fully discussed in the case of *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, and we respectfully submit that the doctrine announced in that case brings the controversy here clearly within the jurisdiction of the court.

However, aside from the Declaratory Judgment Act, the court properly exercised jurisdiction under its general equity powers. Here was an order asserting the power of the Public Utilities Commission of Ohio to fix the price

"That the gas being delivered to The Portsmouth Gas Company, and which has been delivered to it under the contract hereinbefore referred to, is produced, and has been produced during all of said time, in the States of West Virginia and Kentucky, and is conveyed, together with other gas from the same sources, through a pipe line in a continuous flow from said points of production in West Virginia and Kentucky to a point in the State of Ohio, where the same is delivered to The Portsmouth Gas Company; that out of the said pipe line said The United Fuel Gas Company also delivers certain other gas from the same sources to a distribution system supplying the town of New Boston, in the State of Ohio, and the City of Ironton, in the State of Ohio, and that the distribution of natural gas in said town of New Boston and the said City of Ironton, aforesaid, is made to the inhabitants of the said municipalities by said The United Fuel Gas Company through a distribution system owned by said The United Fuel Gas Company; and

"That The United Fuel Gas Company and The Portsmouth Gas Company have no connection with each other by way of interlocking directors or unity of interest; neither has any associate, affiliate or parent company of either of said companies, The United Fuel Gas Company and The Portsmouth Gas Company, and such relation, but the two companies are entirely separate and distinct from each other and are so operated."

The declaration of the Commission and its judgment as to the right to regulate the said rate, as contained in said order, is also for convenience set out as follows:

"The Commission further finds that the furnishing of natural gas by the United Fuel Gas Company to

The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission."

After making these more specific declarations, said Commission denied this appellee's petition for rehearing and allowed the former order to remain in force requiring it to proceed to justify the rate being charged by it to the said Portsmouth Gas Company.

This appellee thereupon presented its bill to the District Court of the United States for the Southern District of Ohio; praying for a determination of its rights in the premises and that the said Public Utilities Commission be enjoined from enforcing said order against it (R. pp. 1-12). In said bill it is averred that heavy penalties are inflicted upon any public utility failing to carry out an order of the Public Utilities Commission, and particularly that the penalty of one thousand dollars for each day's delay in carrying out said order would be inflicted, together with imprisonment, and that the parties charged with the execution of the law would proceed to enforce said penalties against this appellee, unless enjoined therefrom (R. pp. 9-10).

The defendants to said bill answered the same (R. pp. 41-44). In this answer every allegation of fact is admitted, but the conclusions of law arising therefrom are denied.

Before the hearing the parties entered into a stipulation that the facts found by the Public Utilities Commission of

Ohio in the order of May 29, 1935, are the facts pertinent to a consideration of the questions involved, and that a compliance with the order would cost this appellee a substantial sum of money in excess of three thousand dollars. (R. p. 44).

The case was originally heard before a three-judge statutory court, composed of Hon. Florence E. Allen, Circuit Judge, Hon. Robert R. Nevin, District Judge, and Hon. Benson W. Hough, District Judge. Before a decision was reached, Judge Hough departed this life, and it was necessary to have a second hearing of the case, which was done, the Hon. Mell G. Underwood being substituted for Judge Hough.

Pending this hearing, the "Natural Gas Act" (Title 15 USCA, Sec. 717, etc.) was passed, and an amended bill was filed calling the court's attention to this act, and also filing therewith the order of the Federal Power Commission of February 14, 1939, approving the contract between this appellee and the said Portsmouth Gas Company. Said supplemental bill is found at pages 53-56 of the record, and said order of the Federal Power Commission at page 57 thereof.

The Public Utilities Commission of Ohio, as well as the other defendants, moved to dismiss the bill (R. p. 58). This motion was overruled by an order entered July 8, 1941 (R. p. 69). The defendants then answered said bill (R. pp. 70-75), which, in effect, admits all of the facts before pleaded, but challenges the legal conclusions drawn therefrom. The court thereupon handed down its opinion (R. pp. 76-85) granting this appellee the relief prayed for, and entered judgment in accordance therewith (R. pp. 85-86).

## THE NATURAL GAS INVOLVED IN THIS PROCEEDING IS INTERSTATE COMMERCE

Upon the hearing in the court below, the defendants conceded upon the record that the transportation into the State of Ohio by pipe lines of gas produced in the States of West Virginia and Kentucky is interstate commerce. See opinion of the court below (R. p. 81). Appellants seem now to retreat from this position in their assignment of errors, and assign as error the action of the District Court in holding the transaction to be interstate commerce. It therefore becomes necessary at the outset to determine this question. It is agreed that the facts found by the Commission (R. p. 38) in regard to this matter, are the facts. This specific finding has been heretofore quoted herein. From it, it appears that the natural gas involved is produced or purchased by this appellee in the States of West Virginia or Kentucky, or both, and is transported through a pipe line, in a continuous flow, from said points of production in the State of West Virginia and Kentucky to a point in the State of Ohio, where the same is delivered to the Portsmouth Gas Company. It is also found as a fact by said Commission that there is no connection between the United Fuel Gas Company and the Portsmouth Gas Company by way of interlocking directors or unity of interest, neither is there such connection between any associate, affiliate or parent company of either of said companies, but the two companies are entirely separate and distinct from each other and so operated. It is also a fact found by the Commission that out of this same pipe line the United Fuel Gas Company delivers gas to a distribution system owned by it in the City of Ironton, Ohio, and the village of New Boston, Ohio, from which distribution system it delivers natural gas to the inhabitants of those places. This transaction, however, has no relation whatever to the delivery of natural gas to the Portsmouth Gas Company.



It is a little difficult to understand the basis of appellants' contention that the natural gas here involved is not interstate commerce. It is produced in the States of West Virginia and Kentucky, transported through a pipe line from those States across the Ohio River into the State of Ohio, and there sold and delivered to the Portsmouth Gas Company. The decisions of this court make it quite clear that natural gas is no different from any other product in so far as the question of determining its characterization as interstate commerce, or otherwise, is concerned. In the case of *Public Utilities Commission v. Landon*, 249 U. S. 236, this court held:

"That the transportation of gas through pipe lines from one state to another is interstate commerce, may not be doubted. Also, it is clear that, as part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state."

The facts in that case bear an almost complete analogy to the facts here. There the complaining company produced the natural gas involved and transported it to another State, where it was delivered to a number of independent distribution companies which, in turn, received the same and delivered it in small quantities to the individual consumers. There was a contract between the producing company and these small distributing companies providing for the sale of the gas and, as compensation therefor, a percentage of the price at which the same was sold. The Utilities Commission prescribed rates at which the distributing companies should sell the gas to their consumers. The producing company in the cited case contended that the percentage of such rates to which it was entitled under the contract would not furnish it adequate compensation for the gas which it had delivered. The court held that the producing company was not con-

cerned with the rate at which the gas was sold to the consuming public, and that the Public Utilities Commission had the right to fix a just and reasonable rate for the service, based upon such information as it was able to obtain. If the producing company entered into a contract the result of which was to give it a less share of the amount received from the consumers than the value of its service would entitle it to, that was a matter that the courts had nothing to do with, but was controlled entirely by the contract of the parties, and that they being *sui juris*, it would not be disturbed. This case is a clear holding that natural gas transported under conditions exactly similar to the conditions involved here, is interstate commerce.

In *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, this court again declared such a transaction as that involved here to be one in interstate commerce. It was there held that the gas ceased to be interstate commerce when it was delivered to the distributing system and broken up for delivery to the customers. In announcing the conclusion that the transaction was interstate commerce to the extent that we are interested in it here, the court, on page 470 of the opinion, says:

“The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and then by means of appellant’s high pressure transmission lines to their connection with its local system, is essentially national—not local—in character, and is interstate commerce within as well as without that state.”

Likewise, in the case of *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, this court held that gas transported from one state to another was interstate commerce, and it so held in that case, notwithstanding all of the gas transported was commingled and part of it used within the state of its origin.

In *Pennsylvania v. West Virginia*, 262 U. S. 553, this court likewise held that the transportation of natural gas from one state to another for sale and consumption in the latter, was interstate commerce. The question there involved was the validity of an Act of the Legislature of West Virginia prohibiting the transportation of natural gas from the state until the demands of West Virginia consumers had been first satisfied. This act was attacked by the States of Pennsylvania and Ohio, upon the ground that it imposed an unlawful restriction upon interstate commerce, and this court so held and the act was declared invalid.

The case of *State of Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, presents a complete analogy to the case we have here. In that case the Kansas Natural Gas Company was the producer of the gas. It transported it from the place of production and delivered it to distributing companies in the States of Kansas and Missouri. The public utility commissions of these States attempted to regulate the price that it should charge for this gas to these local distributing companies, with a view of reducing the rate the distributing company should charge the consumers. This action of the commissions was resisted by the producing company, and the question of the right of the commissions to so regulate the price at which the gas should be sold to the distributing companies came to this court on appeal. It was held:

“The transportation of gas through pipe lines from one state to another, for sale to distributing companies, is interstate commerce, so that the state authorities have no control over the rates to be charged for it, and the fact that Congress has taken no action in the matter is immaterial.”

Another case in which this court distinctly held that such transactions are interstate commerce is *Peoples Natural Gas Co. v. Public Service Commission of Pa.*, 270 U. S. 550. In that case the Peoples Company had been selling gas to a distributing company in the City of Johnstown, Pa. It appeared that a considerable part of this gas was produced in the State of Pennsylvania, but part of it was produced in the State of West Virginia, and sold to the Peoples Company at the state line. The Peoples Company sought to discontinue this supply of gas to the Johnstown Company. The Public Service Commission of Pennsylvania denied the right to do so and sought to compel the Peoples Company to continue this supply, holding that inasmuch as the ownership of the gas transported from West Virginia was changed at the state line, it ceased to be interstate commerce, and also holding that even though the West Virginia gas might be interstate commerce, there was plenty of gas produced in the State of Pennsylvania to supply the needs of the City of Johnstown. These holdings were both approved by the Supreme Court of Pennsylvania, but upon appeal to this court, it was held that the Pennsylvania court was in error in holding that the West Virginia gas was not interstate commerce because of change of ownership at the state line, announcing the doctrine that the ownership of the commodity had nothing to do with its character as commerce, but that this depended entirely upon its movement. It held, however, that inasmuch as the Peoples Company produced very much more gas in the State of Pennsylvania than was required for supplying the demands in the particular case, the order of the Commission could not be said to interfere with interstate commerce, for the reason that these demands might be met out of the gas produced locally.

Another case involving the same question is that of *Public Utilities Commission of Rhode Island v. Attleboro*

*Steam & Electric Co.*, 273 U. S. 83. The question involved there was upon a complaint filed with the Rhode Island Public Utilities Commission by the Narragansett Electric Light Company, the producer of the electricity, averring that the contract which it had with the Attleboro Company for furnishing electricity no longer gave it adequate compensation for the service rendered. All of the operations of the Narragansett Company in producing the electricity were carried on in the State of Rhode Island. The Attleboro Company was located in the State of Massachusetts, and all of the electricity used by it was conveyed to it over the wires from the point of production in Rhode Island to the point of consumption in Massachusetts. The Attleboro Company responded to this application that the contract it had with the Narragansett Company was not subject to regulation by the Public Utilities Commission of Rhode Island, for the reason that the electricity purchased by it was interstate commerce. The Narragansett Company insisted that while it was true the electricity might be interstate commerce, still if it was compelled to sell electricity under this contract to the Attleboro Company at a loss, it would have to recoup this loss from its local consumers in Rhode Island, and for that reason the Public Utilities Commission of Rhode Island would have a right to regulate this price. The Public Utilities Commission of Rhode Island sustained this contention, holding that it had a right to fix the rate to be charged for the electric current. The Supreme Court of Rhode Island, upon review, reversed this holding and held that the electricity being interstate commerce, the Commission did not have a right to regulate the price at which the same should be sold; that it did not follow that the consumers in Rhode Island would be affected by the adequacy of the rate, but that the loss, if any, that might arise therefrom must fall upon the stockholders of the company, the officers of whom had made an improvi-



dent contract. Upon appeal to this court, this view was entirely sustained, and it was held that the public authorities of Rhode Island were entirely without authority to regulate the price at which the commodity should be sold in interstate commerce.

This view is clearly reflected and emphasized in the case of *Western Distributing Co. v. Public Service Commission of Kansas et al.*, 285 U. S. 119. More recently this court has dealt with the same question in *Federal Power Commission v. Natural Gas Pipe Line Co.*, decided March 16, 1942, 86 L. Ed. 699, and *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, decided January 5, 1942, 86 L. Ed. 322, holding that natural gas transported under substantially similar conditions to those involved here was interstate commerce.

The decisions determining when commodities become interstate commerce are numerous, but we have limited our citation to those decisions involving the same commodity that is involved in this case.

The argument seems to be that because the appellee here transports through the same pipe line through which it transports the gas to the Portsmouth Gas Company, other gas which it delivers to a distribution system owned by itself and thereafter distributes it to retail consumers, it thereby becomes amenable to the regulations of the Public Utilities Commission of Ohio as to all or any transactions which it may have. This argument is entirely untenable. It is entirely competent for the same party to engage in a business exclusively intrastate and subject to local regulation and also, at the same time, in a business interstate and not subject to such regulation. The test of whether or not it is subject to local regulation is the character of the particular business done and not the party who does it. This is clear from the decisions above cited.

This question would seem to be put at rest by the holding of this court in the case of *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U. S. 83. The contention was made there that inasmuch as the principal business of the Narragansett Company was local or intrastate commerce and subject to local regulation, the very small amount of the business involved in the litigation should likewise be so subject. In disposing of that contention, this court, at page 90 of the opinion, said:

"The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business it is none the less beyond the power of the state because this may be the smaller part of its general business. Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress."

THE COMMODITY HERE INVOLVED BEING INTERSTATE COMMERCE; THE PUBLIC UTILITIES COMMISSION OF OHIO HAS NO POWER TO REGULATE IT OR TO REGULATE THE DEALINGS OF PARTIES THEREIN.

What we have heretofore said would seem to demonstrate that the commodity with which we are dealing is interstate commerce, and assuming that this has been shown, has the Public Utilities Commission of Ohio any power to regulate the dealings in it, notwithstanding the fact that it is commerce between the states? The decisions of this court, we think, answer this question in the negative.

In the case of the *State of Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, this court had occasion to consider the exact question here presented. It was there contended that the matter was one requiring regulation, and that the Congress not having regulated it, the state authorities would have the right to do so. This court answers that contention, at page 308 of the opinion, in the following language:

"The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation."

This court also considered the power of state authorities to impose burdens on interstate commerce, regardless of whether the same had been regulated by Congress, in the *Minnesota Rate Case*, 230 U. S. 352, and, at page 396, uses the following significant language:

"If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which, in the absence of Federal regulation, should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected."

The same doctrine is announced, in effect, in *Public Utilities Commission v. Landon*, 249 U. S. 236. This court has never departed from the doctrine of these decisions. In fact, if there has been any change of attitude, the tendency is to extend the Federal jurisdiction rather than to contract it. We insist, therefore, that, regardless of all other questions that may arise in this case, the commodity involved is interstate commerce, and this being so, the *Public Utilities Commission of Ohio* was and is without power to regulate the price at which the same shall be sold by this appellee to its vendee, the Portsmouth Gas Company.

Notwithstanding the fact that the appellants in their brief in the District Court declared that the natural gas involved in this proceeding to be interstate commerce, as shown by the quotation from that brief in the opinion of the District Court at pages 81 and following of the printed record, they now devote the greater part of their argument to an attempt to show that the declaration they then made and upon which the lower court acted, is not correct. It might be suggested that the appellants having invited the lower court to take the position which it did, they cannot now assume a contrary position. The elaborate attempt of of the appellants to show that the commerce involved here is not interstate and for that reason is subject to regula-

tion by the Public Utilities Commission of Ohio, resolves itself into several contentions:

1. That the pressure of the gas being reduced at the point of delivery to the Portsmouth Gas Company, its character as interstate commerce disappears;

2. That because this appellee is also engaged in distributing natural gas in the State of Ohio to another community, all of the business it does there is subject to public regulation;

3. Even though it be admitted that the transaction involved is interstate commerce, still the Public Utilities Commission of Ohio may regulate the rates to be charged because the Congress of the United States had not, at the time involved, prescribed any regulation therefor;

4. Because this appellee, in its answer before the Public Utilities Commission of Ohio, offered to permit the said Commission to have access to all of its books and records for any proper purpose, it submitted to the jurisdiction for all purposes and cannot now question the jurisdiction of the Commission to do anything it pleases.

We will discuss each of these propositions briefly.

It is argued that the pressure in the line through which the gas is delivered to the Portsmouth Gas Company must necessarily have been reduced because other gas was taken out of this line for delivery to another city. Of course, this court knows that under the law of physics the pressure in the line varies with the quantity of gas withdrawn therefrom, and even though no gas was ever taken out of this line except by the Portsmouth Gas Company, the pressure at the point of delivery would vary as the quantity taken from the line varied. The fact that more than one distributing system may be supplied from the same pipe line does not change the character of the commerce transported through that line. In the case of *Public*



*Utilities Commission v. Landon*, 249 U. S. 236, the natural gas was distributed from the pipe line there to a number of distributing companies along the line, and, of course, just as here, the pressure in the trunk line varied with the quantity of gas withdrawn therefrom; but this did not prevent the same from being characterized by this court as interstate commerce. In the case of *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, the court said that the natural gas became intrastate commerce when it was delivered into the distribution system and the pressure reduced by regulators from that maintained in the trunk line, to the pressure at which it was delivered to ultimate consumers. It is clear from a reading of that case that the change in pressure referred to by the court there meant the reduction of the pressure from that maintained in the trunk line, by means of regulators, to that maintained in the distribution lines. In other words, it was a breaking up of the bulk delivered in interstate commerce into appropriate units for sale to the ultimate consumer. This construction is made quite clear in the case of *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, *supra*. It was there contended that because the pressure in the line was changed at the point of delivery, it ceased to be interstate commerce and, therefore, became subject to regulation by the State authorities. This court in that case held, in effect, that the change of pressure referred to was not variations in the trunk line pressure, but was that change in pressure which resulted from passing gas through regulators for the purpose of reducing it from the trunk line pressure of from 50 to 300 pounds to the delivery pressure to consumers of approximately 8 ounces, and held that notwithstanding the pressure was reduced at the point of delivery from one transmission line into another transmission line, this did not destroy the character of the substance as interstate commerce.

It is also urged that because this appellee furnishes gas to another municipality in the State of Ohio, in the performance of which service it is subject to regulation by the Public Utilities Commission, that all business done by it in that State becomes intrastate commerce and subject to regulation by the local authorities. It is true that this appellee distributes gas to the citizens of the City of Ironton, Ohio, and the village of New Boston in said State, and that the gas furnished to these two municipalities comes from the same supply line as that delivered to the Portsmouth Gas Company. It is difficult to see how the fact that this appellee is engaged in the distribution of natural gas in these municipalities can have any bearing upon the transaction with the Portsmouth Gas Company involved here. All of the gas passing through this transmission line is interstate commerce and remains interstate commerce, under the decisions of this court, until it is broken up and the pressure reduced so that it can be delivered to consumers in the quantities and under the circumstances appropriate to their use. Undoubtedly the gas delivered by this appellee to the Ironton and New Boston consumers is interstate commerce until the time it passes into the distribution lines in those municipalities, and just so, the gas delivered to the Portsmouth Gas Company is interstate commerce until it passes into the distribution lines and is properly treated for distribution to the consumers by the Portsmouth Gas Company. When this happens, this appellee is no longer interested in it.

The argument is also made that even though the transaction involved is interstate commerce, yet Congress not having regulated the same, the local authorities would have the power to do so. It is quite true that there are many holdings to the effect that where Congress has not acted in connection with a matter involving interstate commerce, the local authorities may make inconsequential regulations in regard thereto; but this court has uniformly

of natural gas for the City of Portsmouth and requiring this appellee to produce immediately before it evidence as to what this rate should be. If appellee carries out the order, it will require the expenditure of a large sum of money, averred in the bill (R. p. 10) to be at least the sum of \$100,000.00, and this is not denied. If it refuses to carry out the order, it will subject itself to penalties, which, it is averred in the bill (R. p. 9), will be enforced against it and which amount to not less than \$100.00 nor more than \$1,000.00, and each day's failure shall constitute a separate offense. Under these circumstances, we respectfully submit that the court below properly took jurisdiction of the cause and granted the relief that it did.

It has been said by this court that the granting of an injunction is, to some extent at least, discretionary with the court of first instance. This discretion of the courts may be exercised as well to grant the injunctions as to refuse it.

*Di Giovanni v. Kansas Fire Ins. Co.*, 296 U. S. 64;

*Petroleum Exploration Co. v. Public Service Commission of Kentucky*, 304 U. S. 209.

The exercise of this jurisdiction will not be reviewed by an appellate court unless there has been clear abuse thereof. It surely cannot be said that the court here abused this discretion by granting the relief in a case where the complaining party had the alternative of expending more than \$100,000.00 in compliance with the alleged invalid order, or submitting itself to the chances of penalties ranging from \$100.00 to \$1,000.00 a day by refusing to comply with it. Under such circumstances, we think it would have been a clear abuse of discretion had the court refused the relief which it granted. So we say that, irrespective of the Declaratory Judgment Act, the court,

in the exercise of its general equity jurisdiction, properly granted the relief which it did in this case.

The appellants argue that the court below did not have jurisdiction of the controversy here because there had been no final order. This is not a case in which there is any attempt to appeal from an order of an administrative body under statutory provisions, and the cases cited have no application. This case directly invokes the jurisdiction of the court to settle a controversy which has arisen between the parties, and is controlled by such cases as *Gully, Tax Collector, v. Interstate Natural Gas Co.*, 82 Fed. (2d) 145 (Certiorari denied, 298 U. S. 688); *Interstate Natural Gas Co. v. Louisiana Public Service Comm.*, 34 Fed. Sup. 980; and *Kentucky Natural Gas Corp. v. Public Service Comm. of Ky.*, 28 Fed. Sup. 509, affirmed in *Public Service Commission of Ky. v. Kentucky Natural Gas Corp.*, 119 Fed. (2d) 417.

#### THE FEDERAL POWER COMMISSION HAS THE SOLE POWER TO REGULATE THE TRANSACTIONS INVOLVED IN THIS PROCEEDING.

The Federal Natural Gas Act (Title 15, USCA, Sec. 717, etc.) confers upon the Federal Power Commission exclusive jurisdiction to regulate the rates charged for natural gas transported in interstate commerce. Section 717c requires the seller to file its rates with the Federal Power Commission, and forbids any change in these rates without the authority and approval of that Commission. This provision of the law has been complied with by this appellee, as appears from the order of the Federal Power Commission approving the same (R. p. 57). If it be contended that the Public Utilities Commission of Ohio can inquire into this rate and ascertain what in its judgment would be a proper rate, and require this appellee to

charge the same, it would be in the position of being required to charge a rate prescribed by the Public Utilities Commission of Ohio and inhibited by the Federal Power Commission, unless, perchance, the two Commissions should come to the same conclusion. The rate now in effect is already approved by the Federal Power Commission. Under the law, therefore, the Public Utilities Commission of Ohio could not prescribe any other rate, and any investigation or inquiry by it would be entirely futile.

It is contended, however, that the Federal Natural Gas Act not having been in effect when this appellee was brought into this proceeding, it can have <sup>no</sup> effect upon the jurisdiction of the Ohio Commission. It must be borne in mind that utility rates are prospective in their operation and that, even though it be admitted for the sake of the argument that the Public Utilities Commission of Ohio would have jurisdiction to regulate this rate in the absence of affirmative action on the part of the Congress of the United States, still that power could be taken away from it and would be taken away from it the very minute that Congress exercised its superior power over the transaction. Just as soon as the Natural Gas Act became effective, the Ohio Commission lost all power, if it ever had any, to regulate any transactions between this appellee and the Portsmouth Gas Company.

The appellants argue that in view of the fact that this proceeding before the Public Utilities Commission was instituted prior to the passage of the Natural Gas Act, it, (the Natural Gas Act) would have no pertinency in the consideration of the case; that the Federal Power Commission under the Natural Gas Act could make no order that would affect the rights of the parties arising before the passage of that Act. Assuming this to be true, it is just as true that the Public Utilities Commission of Ohio can make no order affecting rates such as are involved here retroactively. The only order that Com-



mission could make would be one fixing the rates for the future. In *Great Miami Valley Asso. v. Public Utilities Comm of Ohio*, 131 Ohio State 285, this exact question was before the Supreme Court of Ohio. In that case a complaint was made that certain rates charged were excessive. The Commission, after a hearing, found said rates to be excessive and prescribed a rate to be charged. The complainants insisted upon the Commission awarding reparation from the time the complaint was filed, but the Commission held that it had no power to afford any such relief, and on appeal to the Supreme Court of Ohio, the Commission was sustained in this regard. The law as disclosed by the Supreme Court of Ohio in that case must control any action the Commission might take in this case. All that Commission could do would be to prescribe a rate for the future, and inasmuch as the Natural Gas Act has come into effect before it prescribed any such rate, its power to do so is now entirely gone. The only tribunal that could fix any rate is the Federal Power Commission.

The jurisdiction of the Federal Power Commission to regulate rates such as are involved here, sufficiently appears from the cases of *Federal Power Commission v. Natural Gas Pipe Line Co.*, decided by this court on March 16, 1942, 86 L. Ed. 699, and *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, decided by this court on January 5, 1942, 86 L. Ed. 322.

On the whole case, we respectfully submit that the judgment of the lower court is correct and should be affirmed.

HAROLD A. RITZ,  
Charleston, W Va.,

FREEMAN T. EAGLESON,  
Columbus, Ohio,  
Counsel for Appellee,  
United Fuel Gas Co.

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# Supreme Court of the United States

OCTOBER TERM, 1942.

No. 87.

THE PUBLIC UTILITIES COMMISSION OF OHIO,  
ET AL.,

Appellants,

vs.

THE UNITED FUEL GAS COMPANY, ET AL.,  
Appellees.

PETITION FOR REHEARING AND STATEMENT IN  
SUPPORT THEREOF.

THOMAS J. HERBERT,  
Attorney General of Ohio,  
KENNETH L. SATER,

Attorney for The Public Utilities Commission of  
Ohio,

Attorneys for Appellants.





# Supreme Court of the United States

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OCTOBER TERM, 1942.

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No. 87.

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THE PUBLIC UTILITIES COMMISSION OF OHIO;  
ET AL.,

Appellants,

vs.

THE UNITED FUEL GAS COMPANY, ET AL.,

Appellees.

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## PETITION FOR REHEARING AND STATEMENT IN SUPPORT THEREOF.

Appellants, your petitioners, hereby submit that they have been aggrieved by the opinion of your Honors rendered herein on the eleventh day of January, 1943, in the respects hereinafter set forth and pray for a rehearing in the premises.

Had it been foreseen that your Honors majority opinion would involve a discussion of Sections 614-21 and 614-23, Ohio General Code, your petitioners trial brief would have given full answer thereto.

Under the law of Ohio, distribution rates for gas may be established by either of two methods. If the distribution rate is to be set within an incorporated municipality, that city may by ordinance establish the just and lawful rate, charge, toll, etc.; or if the community is unincorporated or if the municipality has not acted by ordinance, the utility in order to establish the just and lawful distribution rate is permitted to file with appellant commission a schedule of rates. The former method is found in the case at bar; but in neither event is a wholesale rate involved—only the distribution rate.

Sections 614-44 to 614-46, inclusive, Ohio General Code, are quoted in the appendices to appellants' trial brief herein and allude to the first method of establishing distribution rates, namely, by municipal ordinance with the right of appeal reserved to the utility and the power in appellant commission under certain conditions to establish a substitute rate. This, as stated, was the method used in the case at bar. Sections 614-20 to 614-23, inclusive, Ohio General Code, allude to the second method of establishing a distribution rate, namely, by schedule in both unincorporated communities and in municipalities which have failed to enact a rate ordinance. These latter statutes were not quoted in your petitioners' trial brief because they had no application to the case at bar in view of the fact that the city of Portsmouth had duly enacted a distribution rate ordinance.

Under Section 614-44 et seq., Ohio General Code, the rate established by municipal ordinance usually becomes immediately effective and consequently when there is appeal by the utility, the bond required by Section 614-45 is a necessary protection to consumers if the utility would continue to collect the last legal rate in effect. In such a case the commission's ultimate action dates back to the origin of the ordinance (if the rate is found to be confiscatory) and the bond in the meantime has protected the retail consumers on the matter of any interim charges and payments. Under Section 614-20 et seq., the rate established is based not upon ordinance but upon schedule and, different from an ordinance rate, does not become immediately effective; by statute 120 days are given the commission to investigate and approve or reject the rate and in the meantime interested parties may protest. Until the commission approves or rejects the newly tendered schedule, the last legal rate remains in effect and there is no power in the commission to make its findings and order retroactive; hence, there is no need for a bond such as that provided for in Section 614-45 and the law consequently provides for none.

**Great Miami Valley Taxpayers Ass'n. v. Public Utilities Commission of Ohio**, 131 O. S., 285, 2 N. E. (2nd), 777, it will be seen from the foregoing discussion, related only to a rural distribution rate established by schedule under Sections 614-20 to 614-23, Ohio General Code. The commission's order could not be retroactive (the preceding legal rate was still in effect) and consequently there could be no refund or any need for a bond to guarantee a refund. Section 614-2, Ohio General Code, was neither utilized nor cited therein. These are the reasons why

this case was not cited in your petitioner's trial brief herein.

Section 614-2, Ohio General Code, is the only statute which directly confers on appellant commission jurisdiction over wholesale gas utility rates in the state of Ohio; the pertinent portion of this statute is quoted in the appendices of appellants' trial brief; its pertinent clause states that

"All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas company providing for the supply of natural gas and for compensation for the same, shall be subject to the jurisdiction of the commission, whether or not such rates, rentals, tolls, schedules, charges or agreements shall have been agreed upon or put into effect prior to the taking effect of this provision"; (115 Ohio Laws, 180, 181.)

An examination of 102 Ohio Laws, 555, et seq., indicates that the distribution rate laws specified above were originally enacted in 1911, 22 years prior to the portion of Section 614-2, Ohio General Code, quoted immediately above. In bearing out this explanation of the Ohio laws, an examination of either the Ohio General Code or the session laws of Ohio shows that every other section of the Ohio General Code relating to retail rates of public utility gas companies was also originally enacted in 1911. If it is to be assumed that appellant commission had any direct statutory authority over intercorporate wholesale rates within the state of Ohio prior to 1933, it must also be assumed both with regard to import and to date of enactment that the legislative amendment of Section-

614-2, quoted above, was a vain and futile thing. Naturally no such presumption exists and, furthermore, all decisions of appellant commission and of all courts in the state of Ohio are to the contrary. It was an amendment appropriate to full regulation of distribution rates in Ohio.

The possible comment that the quoted amendment to Section 614-2, Ohio General Code, is not retroactive in its effect is met by the three following facts: (1) the date of its enactment covers half of the distribution rate period in question; (2) the statute specifically provides that it shall cover contracts "agreed upon or put into effect prior to the taking effect of this provision," and, (3) its scope is not limited to its effect upon distribution rates created by either municipal ordinance or utility schedule. It applies with as equal force to municipal ordinance rates calling for a bond and refund with retroactive effect as to scheduled rates effective only in the future, and partakes of the nature of the proceeding wherein it is then being utilized. Any other conclusion is again an assumption that the Legislature has done a vain and futile thing. The present investigation and litigation are the first effort of appellant commission to use that law incident to the determination of a distribution rate; consequently, the law has never been construed by an Ohio court.

The practical application of this matter is that if appellant commission is permitted to consider the contract rate between United Fuel and the Portsmouth Gas Company for the years 1932 to 1934, the ultimate distribution rate then and so established would have carried on beyond the ordinance period ending in February, 1934, and



would have continued under the law of Ohio to be the last legal rate in effect until the city of Portsmouth enacted another rate ordinance or the Portsmouth Gas Company had filed a schedule with appellant commission.

It is felt that your Honors majority opinion as it now stands will tend to create confusion in the regulation of distribution rates for public utilities established by rate schedule in the state of Ohio. It is not your petitioners' belief that it was the intention of your Honors' majority opinion to so construe the pertinent portion of Section 614-2, Ohio General Code, which concededly appears in an unusual setting in the utility laws of Ohio. Your petitioners do not feel that this law has been superseded by the Natural Gas Act.

Respectfully submitted,

THOMAS J. HERBERT,  
Attorney General of Ohio,  
KENNETH L. SATER,

Attorney for The Public Utilities Commission of  
Ohio,

Attorneys for Appellants.

I, Kenneth L. Sater of Columbus, Ohio, an attorney regularly admitted to practice in the within court, do certify that in my opinion the foregoing petition for rehearing is well founded and is not presented for the purpose of creating a delay.

KENNETH L. SATER.

January . . . , 1943.



pp 10.  
pp. 1, 2, 3 & 5 dissent

# SUPREME COURT OF THE UNITED STATES.

No. 87.—OCTOBER TERM, 1942.

The Public Utilities Commission of  
Ohio, George McConnaughey, Chair-  
man of said Commission, et al., Ap-  
pellants,

vs.

United Fuel Gas Company, et al.

On Appeal from the Dis-  
trict Court of the United  
States for the Southern  
District of Ohio.

[January 11, 1943.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This is an appeal from a decree of the District Court for the Southern District of Ohio enjoining the enforcement against appellee, United Fuel Gas Company (hereafter called United), of orders made by the Public Utilities Commission of Ohio, 46 F. Supp. 309.

The facts are not in dispute. The Portsmouth Gas Company, a public utility, sells natural gas at retail to the people of Portsmouth, Ohio. It purchases its entire supply of gas from United, a West Virginia corporation. The gas is conveyed through pipelines in a continuous flow from points of production in West Virginia and Kentucky into Ohio, and there delivered to the Portsmouth Gas Company. On February 24, 1932, the City of Portsmouth, under the authority given it by § 614-44 of the Ohio General Code, established the rates to be charged to Portsmouth consumers for natural gas distributed by the Portsmouth Gas Company. This ordinance did not purport to fix the charges made by United for the gas sold to the Portsmouth Gas Company. Claiming that the rates fixed by the city were unreasonable and unjust, the Portsmouth Gas Company challenged the ordinance before the Public Utilities Commission of Ohio. The Commission found that the complaint was justified, and that reasonable and just rates should be substituted for those prescribed by the ordinance. But it also found that it could not determine such rates in the absence of proof that the charges which United exacted from the Portsmouth Gas Company were just and reasonable. The Commission ruled that the sale of gas by United to the Portsmouth Gas Company for resale to consumers in Portsmouth was a public utility service within the meaning of § 614-2 of the Ohio General Code, and that the rates to be charged for such service were sub-

ject to its jurisdiction. Accordingly, on April 18, 1935, the Commission ordered that United prepare and present "all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to the Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio".

United thereupon filed a petition for rehearing with the Commission. The petition asserted that the gas sold by United to the Portsmouth Gas Company was in interstate commerce, that the two companies were wholly independent of one another, and that the Commission therefore went beyond the power of the state in asserting jurisdiction to fix the rates to be charged for gas sold by United to the Portsmouth Gas Company. United recognized, however, the authority of the Commission to compel it to produce evidence in its possession relevant to a determination of just and reasonable rates to be charged by the Portsmouth Gas Company for gas sold to its customers. This proffer of testimony by United, which was not accepted by the Commission, is relevant to the disposition of this controversy: "It [United] does not question the right of said Commission to call upon this petitioner for such evidence and facts as may be in its possession which may show or tend to show what would be a reasonable rate to be charged for gas to the consumers in the City of Portsmouth, and it offers to furnish to the Commission such facts and evidence as may be desired, or to permit any officers or agents of the Public Utilities Commission of Ohio to ascertain such facts and evidence as may be desired from its records and books for the purpose aforesaid, but denies and protests the right or power of said Commission to fix the rates at which petitioner shall sell the gas which it transports into the State of Ohio and delivers to the Portsmouth Gas Company."

On May 29, 1935, the Commission denied this petition. Its order expressly reaffirmed its previous assertion of jurisdiction to fix the rates to be charged for the sale of gas by United to the Portsmouth Gas Company.<sup>1</sup>

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<sup>1</sup> "The Commission further finds that the furnishing of natural gas by the United Fuel Gas Company to The Portsmouth Gas Company for resale to consumers within the City of Portsmouth, Ohio, is a public utility service within the meaning of Section 614-2, General Code of Ohio; that the rates to be charged therefor are subject to the jurisdiction of this Commission; that such jurisdiction includes the right to regulate the rate or price to be charged for such service, and that the exercise of such jurisdiction is necessary for a determination of the matters and things herein at issue before this Commission."



This suit to restrain enforcement of the two orders of the Commission followed. In its original bill, filed July 3, 1935, United alleged that the Commission's orders were an unconstitutional attempt to regulate interstate commerce; that compliance with the orders would entail an expenditure of more than one hundred thousand dollars in order to make the usual appraisals required in determining a rate base; that disobedience to the orders would subject United and its agents to fines of a thousand dollars a day. These allegations were denied by the Commission. But on September 23, 1935, the parties stipulated that "it will cost the plaintiff a substantial sum of money, in excess of three thousand dollars, to comply with the Commission's order".

The bill was still pending at the time of the enactment of the Natural Gas Act of June 21, 1938, 52 Stat. 821, 15 U. S. C. § 717, and the relevance of that statute to the present controversy was duly set forth in an amended bill filed March 8, 1939. The suit did not come to issue for more than two years thereafter. The death of one of the members of the District Court, necessitating reargument and reconsideration of the case, may explain, at least in part, why a case of such public importance should have proceeded at such a leaden-footed pace.<sup>2</sup> It was not until January 16, 1942, that the decree now under review was entered. The District Court held that, regardless of what the situation might have been in the absence of the Natural Gas Act, that statute deprived the Ohio Commission of power to regulate the rates to be charged for gas transported and sold in interstate commerce. And so the court enjoined the enforcement of the Commission's orders against United.

<sup>2</sup> The bill was filed on July 3, 1935, and on the same day a temporary restraining order was issued by District Judge Hough. The case was submitted to a District Court of three judges on September 23, 1935, but on November 19, 1935, before it was decided, Judge Hough died. An amended complaint was filed on November 20, 1936, and a second amended complaint on March 8, 1939, to which answer was made on April 25, 1939. A third amended complaint filed on April 8, 1941, was followed on April 24, 1941, by a motion to dismiss which was denied on July 8, 1941. On July 28, 1941, an application for leave to file an answer was made; this application was granted on August 4, 1941, and an answer was filed the same day. The cause having finally been submitted, the District Court filed an opinion on October 2, 1941, finding that the plaintiff was entitled to injunctive relief. And on January 16, 1942, the decree now under review was entered.

The 1942 Annual Report of the Director of the Administrative Office of the United States Courts (p. 7) discloses that "The median time which elapsed from filing to disposition of civil cases terminated in the district court during the year 1942, which had been tried to court or jury, excluding land condemnation, habeas corpus, and forfeiture proceedings, was 10.7 months; and from issue to trial it was 6.1 months. . . . This compares with periods of 10.2 months and 5.3 months, respectively, in 1941."

4 *Pub. Util. Comm. of Ohio et al. vs. United Fuel Gas Co. et al.*

The Commission contends that the issues of this case lie outside the scope of the Natural Gas Act because the Commission was concerned with the establishment of rates for the sale of gas by United to Portsmouth Gas Company prior to the effective date of the federal Act, and, more particularly, to fix rates retroactive to February 24, 1932, when the city of Portsmouth prescribed the rates for gas sold to consumers by the Portsmouth Gas Company in the ordinance which gave rise to the proceedings before the Commission. This contention, if correct, would require us to consider whether the Commerce Clause of its own force invalidated the Commission's assertion of jurisdiction over the rates upon gas shipped by United into Ohio.

But we must reject the contention of the Commission. It rests upon the assumption that under the Ohio law the state Commission can retroactively fix the rates of United. For it must be borne in mind that the ultimate issue in this suit is the assertion by the Ohio Commission in 1935 of power to fix appellee's rates; that the Commission has not yet exercised the power which it thus asserted; that it has not made the inquiry and the findings which must precede the establishment of new rates; that United has not posted any bond to secure refunds it might be ordered to make; that the Commission's jurisdiction to fix United's rates was denied by the District Court in its decree of January 16, 1942; and that, so far as rates in the past are concerned, the power of the Ohio Commission (apart from any limitations imposed by federal law, whether constitutional or statutory) is dependent upon the authority possessed by it under Ohio law. To sustain the Commission on this phase of the case we would have to find that it was the law of Ohio that the Commission had power to fix rates upon gas sold by United to the Portsmouth Gas Company which would be retroactive to February 24, 1932, when the city of Portsmouth prescribed the rates upon gas sold by the Portsmouth Gas Company to its customers.

Unfortunately we are not aided by a finding of the lower court on this question of state law. Since the District Court was composed of three Ohio judges, they may perhaps have taken Ohio law on this point so much for granted as not to require statement. Under ordinary circumstances we would prefer to leave to others the task of formulating local law. But this case has already been too long in the federal courts, and we do not think it comports with the public interest to remit the controversy for explicit find-

ings by the District Court as to the power of the Ohio Commission to fix rates retroactively. The situation here is quite different from *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496. Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide a substantial constitutional question, considerations of equity justify a rule of abstention. But where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible.

The proceeding before the state Commission arose under § 614-44 *et seq.* of the Ohio General Code (Page, 1926), dealing with appeals to the Commission from municipal ordinances establishing rates to be charged by local utilities. Whenever such an appeal is taken, as it was taken here by the Portsmouth Gas Company, the Commission is required to hold a hearing. § 614-44. If, after such hearing, the Commission finds that the rate fixed by the ordinance is unjust or unreasonable, it must determine the just and reasonable rate to be charged "during the period so fixed by ordinance . . . and order the same substituted for the [ordinance] rate . . ."

§ 614-46. It is clear that under this section of the statute the Commission can establish just and reasonable rates in lieu of those fixed by the ordinance, and can make its order effective retroactively by ordering refunds of charges in excess of the substituted rates. *In re Columbia Gas & Fuel Co.*, 1941 Rep. Ohio P. U. C. 22; *In re Wheeling Electric Co.*, 1941 *id.* 69; *In re East Ohio Gas Co.*, 1939 *id.* 15. The Commission undoubtedly has power, therefore, to establish a just and reasonable rate, retroactive to February 24, 1932, for gas sold by the Portsmouth Gas Company to the people of that community.

But whether the Commission has similar power with respect to rates for gas sold by United to the Portsmouth Gas Company—and that is the controlling inquiry here—is an entirely separate question. Section 614-46 is inapplicable because the rates to be established would not be in lieu of rates fixed by ordinance. The Commission's authority to inquire into the reasonableness of the rates charged by United for gas sold to the Portsmouth Gas Company is to be found in §§ 614-21 and 614-23, which provide as follows: "Upon complaint in writing, against any public utility, by any

person, firm or corporation, or upon the initiative or complaint of the commission that any rate . . . is in any respect unjust, unreasonable, unjustly discriminatory, or unjustly preferential or in violation of law, . . . the commission shall notify the public utility" and hold a hearing. If, after such hearing, the Commission finds that the rate or charge is unjust, unreasonable, or otherwise unlawful, it must "fix and determine the just and reasonable rate, fare, charge, toll, rental or service to be thereafter rendered, charged, demanded, exacted or collected for the performance or rendition of the service, and order the same substituted therefor". § 614-23 (italics added). The statute in terms thus gives the Commission power to prescribe such rates prospectively only. If, after notice and hearing, the Commission finds rates to be unlawful, it can then fix the just and reasonable rates "to be thereafter" charged. The establishment of new rates must be preceded by a finding that the old rates are unjust and unreasonable, and the new rates are prospective as of the date they are fixed. There is no basis in the statute for concluding that the Commission's orders can be retroactive to the date when the Commission's inquiry into the rates was begun; on the contrary, the explicit language of the statute precludes such a construction.

Its annual reports show that the Commission has consistently followed what would seem to be the plain mandate of the statute. See, e. g., *In re Amherst Water Works Co.*, 1941 Rep. Ohio P. U. C. 83; *In re Cincinnati Gas & Electric Co.*, 1940 *id.* 14; *In re Union Gas & Electric Co.*, 1936 *id.* 67. Whatever doubts there may have been about the matter appear to have been removed by the decision of the Supreme Court of Ohio in *Great Miami Valley Tarpayers Assn. v. Public Utilities Commission*, 131 Ohio St. 285, which affirmed a ruling of the Commission that "it was without power to make a refund in a proceeding instituted under and by virtue of the provisions of Section 614-23, General Code." 131 Ohio St. 285, 286. It is not surprising, therefore, that counsel for the Commission did not contend before us that the Commission has power under Ohio law to establish retroactively just and reasonable rates to be charged by United for gas sold to the Portsmouth Gas Company. Our examination of the relevant Ohio materials convinces us that the Commission has not been given such authority.

The Commission in this case has not yet done more than assert its jurisdiction over United's rates. It has not yet held a hearing upon the reasonableness of United's present rates; it has made no



finding whether these rates are unlawful and whether new rates should be substituted; it has not entered upon an inquiry to determine what rates would be just and reasonable. As of the date of the enactment of the Natural Gas Act, therefore, the proceeding before the Commission, so far as United was concerned, was still in an embryonic stage. And we can find no provision of Ohio law which would authorize the Commission to enter orders fixing United's rates retroactive to any date prior to June 21, 1938, when the federal Act became law. The Commission's orders must be treated here, therefore, for purposes of determining whether they are in conflict with federal law, constitutional or statutory, as if they had been made after the enactment of the Natural Gas Act. The case cannot now be disposed of on the basis that would have governed had it come here in 1935. To inquire into the powers the Commission had that year, or any other year prior to the enactment of the Natural Gas Act in 1938, would be to ascertain an abstract question of law. The question we are called upon to decide, and it is the only question, is whether the District Court properly entered the decree under review. That decree was entered on January 16, 1942, after the enactment of the Natural Gas Act, and after United, in filing an amended bill of complaint, based its claim for relief upon that Act. It is familiar doctrine that an appeal in an equity suit opens up inquiry as of the time of the ultimate decision. To decide this appeal on the basis of a legal situation that ceased to exist not only prior to the taking of this appeal but also before issue was finally joined in the District Court, would be to make a gratuitous advisory judgment. It is the case that is here now that must be decided, and it must be decided on the basis of the circumstances that exist now. Cf. *Vandenbark v. Owens-Illinois Co.*, 311 U. S. 538, 542-43, and cases there cited.

And as to rates effective in the future we agree with the District Court that the Natural Gas Act of 1938 governs. Congress by that Act, the constitutionality and scope of which we canvassed last Term in *Puwer Commission v. Pipeline Co.*, 315 U. S. 575, and *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498, preempted the regulatory powers over the transportation and sale of natural gas in interstate commerce. Section 1, after declaring that "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public in-



terest", makes the Act applicable to "the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale". Rates and charges in connection with the sale or transportation of gas in interstate commerce are required to be "just and reasonable". § 4(a). Companies subject to the Act must, under § 4(c), file with the Federal Power Commission schedules of rates and charges, and no changes in such schedules can be made without notice to the Commission and the public. § 4(d). Acting upon either its own motion or complaint of a state or municipality, or a state regulatory body or gas distributing company, the Commission can inquire into the legality of rates and charges of companies subject to its jurisdiction, and can determine the just and reasonable rates and charges thereafter to be observed. § 5(a).

It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess.

Upon the undisputed facts in this record, United is plainly subject to the exclusive jurisdiction of the Federal Power Commission with respect to the rates and charges for natural gas transported by it from West Virginia and Kentucky to Ohio. And, indeed, in compliance with the Act, United has submitted itself to the jurisdiction of the federal agency and filed schedules of its rates and charges. No changes in such schedules can be made without notice to the Power Commission. That Commission, on its own motion, can inquire into the lawfulness of such rates; if the public interest so requires, rates found to be just and reasonable may be substituted. It is indisputable, therefore, that if the Ohio Commission today made the orders complained of in this suit, it would be intruding in a domain reserved to the federal regulatory body. The

power to fix rates for natural gas transported and sold in interstate commerce has been entrusted solely to the Federal Power Commission. It does not follow, of course, that the Act bars a state commission, in the appropriate exercise of its jurisdiction, from compelling the production of evidence relevant to the proceeding before it. But the orders before us went beyond this limited purpose. They undertook to assert a jurisdiction which the state body does not possess. In our conclusion regarding Ohio law, we hold only that the assertion of power by the Public Utilities Commission of Ohio must be construed in the light of its authority under the Ohio statutes. And, as thus construed, the order cannot be reconciled with the action of Congress in enacting the Natural Gas Act of 1938. Because the orders are not an assertion of jurisdiction to fix the rates of United prior to the enactment of the federal Act, it is unnecessary to decide whether, in the absence of federal statute, the state could successfully attempt to fix the rates charged by an interstate natural gas company for gas transported and sold from one state to another.

Since these orders are invalid insofar as they impinge upon an authority which Congress has now vested solely in the Federal Power Commission, the decree below must stand unless we can fairly conclude that it was an abuse of discretion for the District Court to grant relief by way of injunction. It is perhaps unnecessary at this late date to repeat the admonition that the federal courts should be wary of interrupting the proceedings of state administrative tribunals by use of the extraordinary writ of injunction. But this, too, is a rule of equity and not to be applied in blind disregard of fact. And what are the commanding circumstances of the present case? First, and most important, the orders of the state Commission are on their face plainly invalid. No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act. If, therefore, United complies with these orders, it will be put to the expenditures incident to ascertaining the base for rate-fixing purposes—expenses which may ultimately be borne by the consuming public and which Congress, by conferring exclusive jurisdiction upon the federal regulatory agency, necessarily intended to avoid. If United does not comply with the orders, it runs the risk of incurring heavy fines and penalties or, at the least, in provoking needless, wasteful liti-

10 *Pub. Util. Comm. of Ohio et al. vs. United Fuel Gas Co. et al.*

gation. In either event, enforcement of the commission's orders would work injury not assessable in money damages, not only to the appellee but to the public interest which Congress deemed it wise to safeguard by enacting the Natural Gas Act. In these circumstances, we cannot set aside the decree of the District Court as an improper exercise of its equitable jurisdiction. *Petroleum Co. v. Comm'n*, 304 U. S. 209, was a very different case. There the regulation of intrastate rates alone was involved, no conflict between federal and state authorities was in issue, and the appeal to equity sought to anticipate the appropriate exhaustion of the administrative process.

29 Two minor objections to the jurisdiction of the court below need not detain us long. The Johnson Act of May 14, 1934, 48 Stat. 775, U. S. C. § 41(1), is inapplicable here because the orders of the state commission "interfere with interstate commerce" to the extent that they constitute an attempt to regulate matters in interstate commerce which Congress has lodged exclusively with the Federal Power Commission. And, unlike the appellant in *Natural Gas Co. v. Slattery*, 302 U. S. 300, 310-11, United exhausted all administrative remedies available to it before bringing this suit. In its petition for rehearing United requested the state Commission to modify its original order of April 19, 1935, so as to strike out those portions which we now hold to be in conflict with the federal Act. Only after the denial of this petition did United seek relief in the courts.

As we construe the decree of the District Court it does not prevent the Public Utilities Commission of Ohio from requiring United to produce data in its possession which may be relevant to a determination of the just and reasonable rates to be charged by the Portsmouth Gas Company for gas sold to the consumers of that city. As has already been noted, United, in its petition for rehearing before the Commission, offered to produce such evidence. And apparently throughout this entire litigation it has held itself ready to do so. The orders of the Commission were assailed only insofar as they subjected United to the jurisdiction of the state Commission with respect to rates for gas imported by it into Ohio. We therefore read the decree of the District Court as an injunction against enforcement of the Ohio Commission's orders only to the extent that this assumption by the Commission of rate-making power over United has been resisted. So read, the decree is

*Affirmed.*

# SUPREME COURT OF THE UNITED STATES.

No. 87.—OCTOBER TERM, 1942.

The Public Utilities Commission of  
Ohio, George McConnaughey, Chair-  
man of said Commission, et al., Ap-  
pellants,

vs.

United Fuel Gas Company, et al.

Appeal from the District  
Court of the United  
States for the South-  
ern District of Ohio.

[January 11, 1943.]

Mr. Justice BLACK dissenting, with whom Mr. Justice DOUGLAS  
and Mr. Justice MURPHY concur.

As a result of this decision, delays incident to obtaining a federal injunction have made wholly futile the diligent efforts of the State of Ohio to fix reasonable gas rates for the people of Portsmouth, Ohio.<sup>1</sup> I cannot agree with the suggestion implied here that this results from any cause other than the unwarranted interposition by courts into the business of rate making. Cf. *McCart v. Indianapolis Water Co.*, 302 U. S. 419, 435. Here eight years after the Ohio Public ~~Service~~ Commission made United a party defendant in order to fix rates "to be charged" by it, Ohio is told that United may keep any sum collected, no matter how unjust or unreasonable the rates charged may have been; and Ohio's citizens are denied the right to recoup possible losses because the Commission "has not made the inquiry and the findings which must precede the establishment of new rates." There is one reason, and only one reason, why the Commission has not made such inquiry and findings—before any step could be taken toward establishing a final rate order, and even before a single witness could be heard, this federal injunction stopped the State Com-

<sup>1</sup> The suggestion in the opinion of the Court that the State is free to continue its efforts to control the rate of the local company, Portsmouth Gas, so long as it does not interfere with United, the company which supplies Portsmouth Gas, accords a privilege of little meaning. The price charged Portsmouth Gas by United is about 70% of the amount which the City Council considered a reasonable rate for Portsmouth Gas to charge. It is obvious that the Portsmouth Gas rate cannot be materially affected without in turn altering the United charge.



mission in its tracks. Had the Commission proceeded to make inquiry and findings in the face of the injunction it would have risked the possibility that its members, agents, and attorneys could have been seized and fined or imprisoned for contempt of court. *Ex parte Young*, 209 U. S. 123. If it be true, which I think dubious, that under Ohio law rates can never be fixed as of the date a proceeding begins even though delays are the consequence of improvident federal injunctions, such a legal situation makes it all the more essential that the court below should have abstained as a matter of "equitable fitness or propriety", *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 229, from tying the Commission's hands and barring it from making the final order here held to be vital. To stop these proceedings at the threshold and thus bar all possible relief for the years during which the litigation crawled along its interminable course seems to me far less justifiable than the action condemned by this Court in *Petroleum Co. v. Public Service Commission*, 304 U. S. 209.

The federal action halting the Ohio rate making process since 1935 is justified wholly on the ground that the Natural Gas Act passed in 1938 bars regulation by Ohio of United's rates since 1938 while Ohio law is said to bar any regulation prior to 1938 because no final order has yet been made by the Public Utility Commission. The Court refuses to hold categorically that Ohio law nullifies this order, asserting instead that Ohio law requires us to interpret the Commission's order as not attempting to lead to rate making for the period 1935-1938. This will doubtless prove some surprise to the Commission which made the order in question in 1935 and which has argued both here and below that the Natural Gas Act is irrelevant because it took effect subsequent to the period in which the Commission is now interested. Whether the Court considers that Ohio law bars the Commission from making a valid order, or whether it uses its knowledge of Ohio law to tell the Commission what the Commission has attempted, is immaterial—in either case we press our conception of Ohio law on the Ohioans. But the local law question has never been squarely decided in Ohio. That question is whether United can successfully, by taking full advantage of the delays of the federal judicial system, jockey the City of Portsmouth and the State of Ohio into such a position that no one can now determine what were reasonable rates for the period prior to 1938.

Reference to state cases and particularly to *Great Miami Taxpayers Association v. Public Utility Commission*, 131 Ohio St.



285, does not solve this problem, for, in the first place, under the state law all appeals to the Ohio Supreme Court are explicitly conditioned upon the posting of bond by the utility to secure payment of any damage resulting from delay. Sec. 548 Ohio Statutes. Such security for which the state law provided should have been exacted by the lower court here, *Inland Steel Co. v. United States*, 306 U. S. 153, 156; cf. *United States v. Morgan*, 307 U. S. 183, 197. "It is especially fitting that equity exert its full strength in order to protect from loss a state which has been injured by reason of a suspension of enforcement of state laws imposed by equity itself." *Public Service Commission v. Brashear Freight Lines*, 312 U. S. 621, 630. The Ohio Supreme Court might well conclude that this failure of the court below to require appropriate security justifies the Commission in establishing a rate for a period prior to 1938. In addition, the very fact that the State Public Utilities Commission and the legal representatives of the State of Ohio have vigorously fought this case for four years since the passage of the Natural Gas Act is indication that they at least do not suppose that the State is powerless to fix rates as of the date United was made a party defendant. We have been cited to no case in which the State Supreme Court has held that an injunction against rate proceedings must result in such inordinate returns as the respondent here may receive.

Under these circumstances our opinion as to the local law "cannot escape being a forecast rather than a determination." *Railroad Commission v. Pullman Co.*, 312 U. S. 496, 499. What was said by the Court there is equally applicable here: "The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court."<sup>2</sup> Here as there "If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise." *Ibid.*, 500, 501.

Even assuming, with the Court, that this delay in the judicial process bars the petitioners from the particular relief sought under local law, I still think we should hold that this injunction was improvidently granted. We are given as the bases of federal

<sup>2</sup> For other cases exemplifying this viewpoint see *Watson v. Buck*, 313 U. S. 387, 402.

equity jurisdiction these propositions: The State order is on its face "plainly invalid"; United will be put to considerable expense in complying with it; non-compliance will result in heavy penalties or in costly litigation. In my opinion none of these separately nor all taken together provide any ground for federal jurisdiction.

What has been said above concerning the necessity of allowing state courts to decide state law is in my view adequate answer to the argument that the order is "plainly invalid." Ohio law in this respect could be adequately interpreted and enforced in Ohio courts. In addition, I do not consider the order before us ripe for review. It is simply a declaration of status requiring nothing of United other than cooperation in exploration of the rate problem for the purpose of eventually setting United's rates, and is thus as properly outside the realm of review now as if this were "an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order." *Rochester Telephone Corp. v. Commission*, 307 U. S. 125, 129. In this respect, the instant case is identical with *East Ohio Gas Co. v. Federal Power Commission*, 115 F. 2d 385, 388. Unless the other grounds of alleged equitable jurisdiction take it outside the scope of the *Rochester* case, this is not the appropriate time for review.

We are told that United will be put to great expense by compliance with the Commission's order in that it must provide certain statistical data necessary so that the Commission may complete its study of the rate problem. It is not suggested that this cost in itself is any reason for enjoining the proceeding nor could it be unless *Petroleum Co. v. Commission*, *supra*, 220, is to be overruled; but the special circumstance offered here is that Congress by passage of the Natural Gas Act sought to prevent such an expenditure. We are given no argument and cited to no legislative history indicating that Congress had any desire to preclude the states from protecting state consumers against unfair rates for the period prior to the passage of the federal Act.

I am not as sure as the majority of the Court that refusal of United to comply with the Commission's order will in fact subject it to heavy penalties.<sup>3</sup> But assuming that this order is backed

<sup>3</sup> The penalty provisions of the Ohio statute, Sec. 614-64 and 65, are applicable where a rate or refund order is disobeyed, *State ex rel. Ohio Bell Telephone Co. v. Ct. of Com. Pleas*, 128 Ohio St. 553, 555, but it may be that orders of the sort here involved are covered by Secs. 614-6 and 7, providing

by the penalty clause, the case should be governed by what we said recently in *Petroleum Co. v. Commission*, *supra*, 220: "No order has been entered fixing rates or regulating conduct. The necessity to expend for the investigation or to take the risk of non-compliance does not justify the injunction. It is not the sort of irreparable injury against which equity protects." Cf. *Dalton Mack. Co. v. Virginia*, 236 U. S. 699.

That United may be subjected to a course of litigation before its rights under the Ohio law are fully determined is the least of all reasons for this use of equity jurisdiction. The compelling consideration here is that "Law suits often prove to have been groundless; but no way has been discovered of relieving the defendant from the necessity of the trial to establish the fact." *Myers v. Bethlehem Corp.*, 303 U. S. 41, 51.

The judgment below should be reversed and the State of Ohio permitted to continue as best it can in view of the long delay caused by the unfortunate intervention of the federal courts.

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for the examination of records and the production of witnesses. If this is so, review may be obtained under Ohio practice without fear of penalty prior to a final judicial determination. See e. g. *Mouser v. Public Utility Commission*, 124 Ohio St 425. We are cited to no cases which indicate which of these procedures governs this order.

*utilize*